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ABSTRACT

This issue of a publication of the Harvard Center for Law and Education contains articles concerning: (1) the failure of the educational "tracking" system; (2) the need for decentralized educational decision-making by the principal; (3) an evaluation of ESEA Title I citing its failure and recommending a strategy for litigation; (4) the failure of Southern desegregation; (5) a review and critique of "The Supreme Court and the Idea of Progress," a collection of Alexander Bickel's lectures on race and education. A regular feature, "Notes and Commentary," reports current research, litigation, government action, and legislation concerning education and the law. In this issue the current reports are court decisions on resource allocation, student rights, the Congressional delay on ESEA Title I comparability, and integration. (DM)

INEQUALITY IN EDUCATION

Number Five

Harvard Center for Law and Education

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# ON THE ROAD TO EDUCATIONAL FAILURE: A LAWYER'S GUIDE TO TRACKING

by Em Hall

*Prologue: Everything taught in the schools isn't listed in the curriculum guide. Schools teach (or claim to teach) every child how to read, to write, to add, subtract, multiply, and divide, and to use these tools to develop other practical, intellectual and social skills. But the schools also teach children their place.*

*Indeed, the schools' major social function can be seen as that of allocating human resources for the larger society, assuring that there will not only be a sufficient number of men of knowledge and learning, but also a sufficient number of hewers of wood and drawers of water. While schools are organized to provide this service, there is more to life in society than work and education could and should be organized to service this wider range of values.*

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Tracking, using the term in the broader sense to include all ability grouping, represents a solution to an insoluble dilemma. While individualized instruction has long been touted as the great desideratum in American education, no one has ever been willing to pay what it would cost to give each child a different education. Educators thus devised what they considered to be the next best thing, educational units large enough to be economically viable but small enough to isolate students with what were thought to be roughly similar educational needs. These needs are determined by an unformulated formula employing "objective testing," classroom achievement, and teacher recommendations. The effect of a particular child's background on performance on these measures is rarely considered.

Though the system was devised to effect educational opportunity for all children, in practice the process has cumulative and severely limiting effects.[1] At every point on the institutional path, educators select certain criteria (and in effect ignore others) as indices of educational need. Having determined need, they then provide differentiated programs on the basis of these needs and group children accordingly. A decision at one point in time limits the range of alternatives available at the next. More often than not, slow readers in the first grade graduate as slow shop students from high school, while children who were judged quick in elementary school are those who end up taking college-level courses in their senior year of high school. More often than not, the social class and race of the child involved appear to have as much to do with their placement as anything else. Class and race influence the teacher's expectations and assessments, they affect classroom achievement (particularly when classes are themselves segregated by race or social class), and they appear to affect performance on placement tests as well. Schools cannot continue to program in this way for relative failure and still claim to function as equalizing agencies. These grouping programs, for whatever reasons, tend to harden the race and class lines drawn in the larger society. They are structurally incapable of offering equality of educational opportunity to those groups who have had it least and need it most.

The educational mechanisms producing these results come in a variety of forms. Grouping takes place within classrooms and between them. It appears in the offer of broad curriculum programs in the same high school. It distinguishes populations of entire buildings; many cities track by schools, as in "Tech High" and "Latin." Resources allocated to the resulting units vary along every descriptive axis: different textbooks; different kinds and qualities and even numbers of teachers; different capital investment patterns; different kinds and qualities and numbers of children. At the same level, programs in different units can vary in content, emphasis, and speed of presentation. Principles of unit assignment can also differ; sometimes only "objective" measures such as intelligence tests are used; more often the more subjective measures such as teacher recommendations and grades are also employed. Nominally and superficially, every local school system differentiates its programs and children differently. Thus, in examining systems, it would be well for the observer not to permit himself to be distracted by differences in terminology, but rather to keep in mind the essential characteristics of the system.

Despite their myriad forms, these systems share a common theoretical underpinning and historical genesis.[2] Furthermore, only four characteristics are critical to analysis of any system at any level where grouping is done on the basis of ability.[3] First, the *inclusiveness* of a grouping scheme determines how many subsequent opportunities at any given educational level remain open to the classified individual. The test of inclusiveness is the extent to which grouping limits or expands future choices or development. In the most inclusive schemes, all children placed in the lowest first grade classification will end up nine years later in the lowest high school track. The second common characteristic is *electivity*, or the degree to which a child's placement reflects his (or his parents') choice. Third is *selectivity*, which comprises the nature of the chosen "index of ability" or "learning capacity" and consequently the type and degree of unit homogeneity resulting from the selection process. Finally, there is what can be called the scheme's *comprehensiveness*, which is a measure of how complete and how long lasting is the effect of any particular classification decision on the individual student.

### Four Characteristics

Each of these characteristics translates painlessly into matters of constitutional concern and statistical debate. If the duty of equal protection is read as an obligation to provide "equal opportunity," then the focus of constitutional interest in the system's inclusiveness falls on its limiting or liberating effects over time. A low first-grade ability group that is genuinely compensatory in nature and has the effect of improving achievement, thereby increasing student options at the next allocation stage, will attract more legal sympathy than one which tends to lock students into a pattern of declining performance, thereby constricting later alternatives. Longitudinal data, following the pattern of grouping decisions in the educational lives of particular children, has never been gathered, but would go a long way in establishing whether early classification decisions tend to be self-fulfilling at later stages of the process. The limited descriptive studies available bear out this widespread belief, but their evidence is as yet merely suggestive and not conclusive.[4]

Electivity raises more difficult equal protection issues to which I return later. It suffices to say here that many free-choice plans leave less to initiative and freedom (which would absolve the state of responsibility for any imposed classification) than to overt or subtle forms of social and educational discrimination. Most school systems, for example, allow entering high-school students a fairly free choice of three basic curriculums: college, general, or vocational. But the student comes to that decision with the collected residue of nine years of previous schooling which will have an obvious and often determinative effect on the options realistically and psychologically available to him. And recent administrative studies have found that support services designed to aid in the exercise of what is left of that free-choice function more to reinforce early school decisions about the student's prospects than they do to expand his alternatives.[5]

Analysis of a plan's selectivity goes to the heart of a different and more direct constitutional requirement: rationality in the means chosen to a legitimate end. A system whose "classifying fact"[6] or ordering criterion relates to ability, for example, must as a minimum include a rational procedure for measuring ability and making judgments accordingly. In equal protection terms of justifying its different treatment of individuals and groups, the state may be required to demonstrate rationality in the plan's implementation as a prerequisite to approval of its substance. Enter the maze of contradictory evidence about the fairness of intelligence tests and the growing data suggesting that even if the tests are fair, their use as a decision-making tool is not. Any plan which either fails to measure ability accurately or to make even-handed grouping decisions accordingly has lost most of its purpose and justification.

That possibility will prove greatest where the effect of the classification decision is most comprehensive. A grouping assignment permanent in time, encompassing in curriculum, and unchanging in class composition may encounter more serious constitutional objections than a plan whose consequences are more limited. The degree of pupil mixing in different classes or subjects, the flexibility for purposes of transfer and promotion, and the provision of ongoing evaluation of assignment decisions will prove preeminent factors in any constitutional analysis of the scope and rigidity of a grouping plan.

### But does it work?

The justification of even the most flexible plan may also disappear if it meets all of these mechanical tests and simply does not work, even on its own terms. The rationale for institution of plans like ability grouping relies heavily on the proposition that students in tracked systems increase their capacity to learn (and their educational achievement) as a consequence of the differentiated programs to which they are assigned. Legal and educational issues converge in the controversy centered around the question of whether ability grouping leads to greater educational achievement by any or all of the group of children affected.

Studies in this area are as numerous as they are inconclusive; grouping research tries hard to make up in bulk what it lacks in hard findings.[7] Many of the most recent reports with more sophisticated methodology focus on comparisons of groups of similar students, half assigned randomly to classrooms and half sent to classes of students of similar ability. The problem posed: Do children grouped homogenously achieve better over a given limited period of time—usually not more than two years—than children who are grouped heterogenously, all other things being equal. Answer: Usually not. Further, there is some evidence that while homogenous grouping has no particular effect on children of high or middle ability, it measurably adds to the disadvantage of children of low ability. At the least, the

research has never validated the educational rationale of grouping, that everyone benefits.

Recent critics of the major studies have argued that the results are inconclusive, either because the situation is ambiguous, or more likely, because their operating assumptions are unsophisticated.[8] Most studies make the simplifying assumption that there is a direct link between the structure of the unit and its member's achievement, ignoring the possibility that the mere fact of being in a low track may have more meaning than whatever measure was used to place the child in a particular track.

The now-famous "Pygmalion effect" adds a psychological dimension to the structural one. In this experiment, children were given tests and teachers were informed that certain children would do well and that others would do poorly. This, in fact, proved to be the case, even though the good and poor risks had been chosen at random; only the teacher's expectations have been changed.[9] A reanalysis of the Coleman Report data indicates that *classroom* race and class composition has a more important effect on student achievement than school race and class composition.[10] So long as grouping is carried on according to the current standard operating procedures, most integrated schools will be segregated by classroom as a result of purportedly neutral selection processes. These selection processes, however, have a strong negative influence on achievement. At this point, debates about the validity of the Coleman data and the precise holding in *Brown* and its progeny will be narrowed to an investigation of the composition of particular classrooms.

These findings are all partial and suggestive; no one has yet added together all that is known. But the picture that might emerge is almost sure to show what has always been supposed, that all the different problems isolated by these studies converge on a single social (and racial) class, with local variations. Those harmed in the various ways the studies describe turn out to be the poor, the black (or Latin, or Indians, or migrant children) and in general those for whom educational success is a matter of survival rather than of supplementation of what they otherwise come by at home. If this convergence at the bottom in fact occurs, then grouping becomes more than an educational practice of undemonstrated worth. It becomes a mechanism through which judicially favored classes, the poor and members of racial and ethnic minorities, are being denied equal access to an education, a government service that is gradually gaining status as a fundamental right.[11]

### Institutional Mismatch

On precisely such grounds, Judge Skelly Wright enjoined the operation of the Washington, D.C., tracking system, going further than any other judicial approach to grouping.[12] The court first gathered a huge amount of data on the mechanics of the four-track scheme devised and operated by then Superintendent of Schools Carl Hansen, noting the great scope, rigidity, and inclusiveness of its operation. Of particular interest to the court was the system's comprehensiveness, the way in which assignment to a track often proved to be inflexible and of long

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duration.

Race and class data established a high correlation between track assignment and the background of the affected child. Wright went on to rule that when state-imposed classifications dealing with critical personal rights—as he ruled education to be—operated in a way that placed the heaviest burdens on the poor and culturally disadvantaged—as assignment to lower tracks seemed to—then the state had to come forward and show a compelling reason for proceeding as they did.

When Washington school officials offered the results of standard aptitude tests as the reason for their grouping practices, Wright ruled those results meaningless, measuring nothing more than the background from which the students came.[13] Since the classifying criteria had nothing to do with relative abilities to learn black and poor children assigned to lower ability groups where less education was offered or expected than in higher ones, were being systematically undereducated.

*Hobsen* thus represents a successful attack on the selective mechanism used in the Washington tracking plan, not a frontal assault on the idea of differentiated services for students with differing educational needs. Wright enjoined the operation of the system not because of its theoretical purpose but because there was no constitutionally legitimate way to match different students to programs offering them greater or lesser amounts of education. Neither the judge nor the plaintiffs insisted that all grouping schemes were impermissible. But without its testing program school administrators could not justify assignment of some children to fast classes and others to slow ones.

### The Quest for a Remedy

Heterogenous grouping would have been the inevitable—though unintended—result if the circuit court of appeals had not worked the miracle of affirming Wright's district court order and at the same time cutting the substance out of his tracking decree. While upholding his rulings on Washington's tracking scheme, it limited their applicability to the system as it operated up to 1968. Local school officials could continue to track on the basis of a testing program, but they could not do so if the new system bore too close a programmatic resemblance to the system Wright had ordered stopped. This hurdle was leaped with alacrity (and very little difficulty). Washington schools continue to track as usual, but with different lines on the chart and different labels on all the little boxes.

Education in Washington is no better than it was, but it is doubtful that the alternative implicitly settled on by Wright would have improved the situation much. Treating all children alike in the services delivered to them has never been thought the apogee of effective education. Random grouping in any urban system produces such a wide range of ability differences within each class that teachers are obliged either to pay no attention to some children or to sub-divide the class according to her own perceptions of the children's differing needs, thus reproducing in classroom miniature the problems raised by school-wide grouping.

In the classroom, the lowest level of school organization, no traditional legal solution for possible grouping abuses can offer much help for sensitive and fundamental change. Granting the wisdom of the "new" equal protection approach Wright used to reach the result he did (which many courts and commentators refuse to do[14]), the problem with his implicit remedy of equal services was that it was no remedy at all. No alternative, short of abandonment of the idea of different services for different children, followed from the *Hobson* opinion.

What did emerge, however, were some negative standards, which suggests that courts may play an important function in circumscribing grouping options available to school administrators who feel that it is educationally necessary to make some kinds of distinctions between children. If *Hobson* did not say what would work, it did indicate what couldn't even be tried, namely grouping plans which tend to isolate poor and black children in lower tracks institutionally designed to offer less education than that given other groups in the same school system. Where such plans are tried, courts will presumably continue to give the wide latitude normally given to administrative actions, but will also require them to give some greater demonstration of the necessity of proceeding as they wish to, a demonstration of worth sufficiently compelling to overcome the harm worked by the systematic undereducation of the socially and racially segregated under track. Such a demonstration is hard to imagine.

Court involvement deeper than this may be foreclosed by the nature of judicial interventions themselves. The flexibility of a fluidly designed system which met individual needs and reflected individual preferences could only be hampered by a court ruling, necessarily prescriptive and rigid. Many of the most important ways in which children are harmfully classified are found either within the single classroom or occur as the result of other non-specific institutional arrangements, such as neighborhood schools. A court-imposed remedy is particularly unsuited to reach practices within classrooms involving thousands of possible forms and relating to the most sensitive human situations. How do you order a teacher to expect more from his students? Would he obey? How would you know if he hadn't?

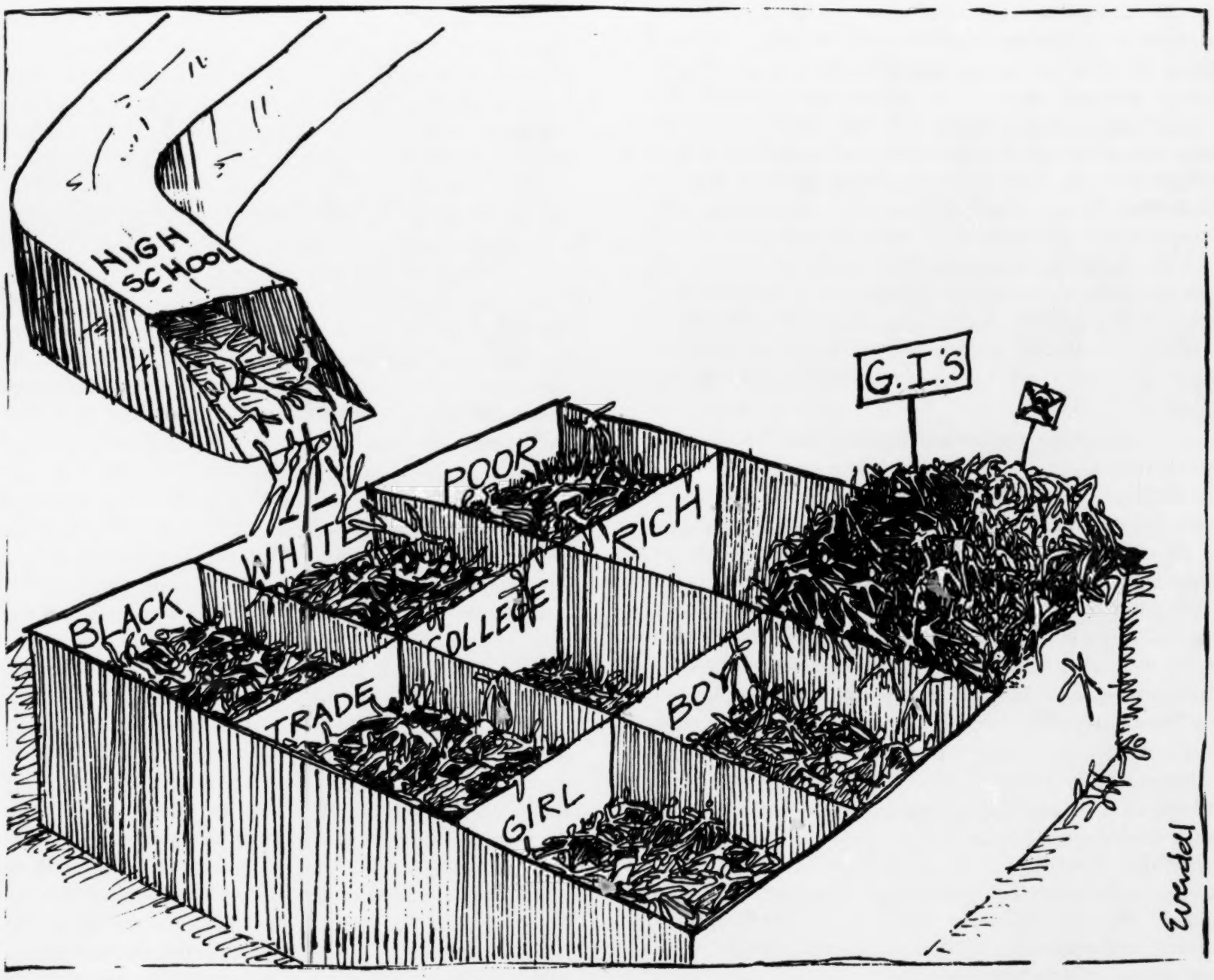
### Changing the Rules

Beyond the institutional mismatch between a court of law and a set of infinitely variable classrooms, there is a further deeper problem with the thrust of equal protection approaches to differential educational services. It is the same problem that promises to make most of the tracking research irrelevant before it produces any hard results. Both equal protection and statistical analysis must

accept the most fundamental operating assumptions of grouping schemes before either can apply whatever angle of vision is deemed relevant–be it resource input, educational output, or discriminatory individual level effects–to test the system's relative impact on different student groups.

That is to say, the educational battle is lost from either the statistical or Fourteenth Amendment viewpoint before the logical war is begun. On a practical level, acceptance of the premises of the argument for ability grouping–that some children can absorb more education than others–leaves no room for proof to the contrary; the system is structured in a way to guarantee that result, no matter what the validity of the initial determination. On a theoretical level, both the statistician and the equal protectionist tend to focus their attention on the points of commonality between tracks for it is at these points that inequalities are most obvious. A change of focus to the principles around which the differentiations are built may be revealing. The emphasis on comparisons between programs can yield only a reduction in their differences. An emphasis on principles yields the insight that what the situation really demands is more differences, not just differences in quantity, but differences in approach, in measure of achievement, in the very definition of education. The failure to consider a broader range of alternatives in the principles on which differential programs are devised makes it highly improbable that any inquiry–judicial, scientific, or otherwise–will yield a better, more complete, and less restrictive way of organizing sub-units.

Differential educational services within particular schools raise educational problems not because they are too different in quantity, but because they do not differ enough in quality. No one seriously doubts that diverse student populations "need" varied educational services. What is being questioned here is the notion that if one portion of geography is desirable for average students, then it follows that slow students should receive three-quarters of a portion while fast students should have one-and-a-quarter portions. But this is what will happen so long as variations in services are controlled by single institutions




Drawing by Coby Everdell/Old Mole. Reprinted by permission.

**The major function of schools can be seen as that of allocating human resources for the larger society.**

and guided by single, restrictively narrow achievement standards. The inevitable yield is differences in children ranging only from better to worse, from smart to dumb, from more educated to less educated.

Real differences in real children are far richer than the narrow range of skills that aptitude tests tap, far more varied than grouping on that basis can allow, and much more neutral with respect to the values one can legitimately attach to them than current school classification systems can structurally admit.

Others have approached the organizational implications of this issue implicitly in arguments advanced for the concept of resource specificity, the idea that different children need different resources to achieve the same educational ends.[15] If this is true, then current grouping schemes are self-defeating and discriminatory.

Simplistically, children (and, at least in the early years, their parents) would be encouraged either to form their own educational units within their schools or to select others that were offered to them. Each child would bring to that unit a per capita entitlement which would be aggregated in that unit and expressed as the total dollar resources available to it. Compensatory funds would follow compensatory children. Advocate planners would provide compensatory political services to parents and children unaccustomed to manipulating the school environment to their own advantage. The sub-units thus formed would then bargain with the central school administrator for the services they thought most appropriate to themselves. The process would culminate in a contract between the school and the sub-group describing the resources to be assigned and specifying the educational program to be pursued with them. In this context, the usual voucher system emerges as nothing more than an idiosyncratic method of bookkeeping which gives only purchasing power without granting the power of enforcement.

The scheme is not as far-fetched as it first appears. Some schools in the north have begun to develop attenuated forms of it already in that sub-units within them have been constructed around divergent educational principles. It involves a radical decentralization of the power to differentiate but alters neither the basic economics or structure of a single public school. It merely penetrates the heretofore monadic classroom. Consider the single classroom + teacher as a school district for the purpose of delivering services. As a core unit which can be expanded or contracted as dictated by the program pursued the classroom as presently constituted is large enough to be economically independent. Teacher salaries consume 80 to 90 per cent of the instructional budget in most systems. Since capital investment patterns are affected not at all, for more than 90 per cent of its activities there will be no savings to the system as a whole in marrying one sub-unit to others. And the classroom has a special integrity as a control unit since most of the activities which make critical educational differences occur there.

In this system, academic achievement is relegated to the status of only one of many possible educational goals. Thus, the notion of relevant differences again expands and the points of relevant comparison further contract. Educational units which are the beneficiaries of resource specificity and which have the ability to vary their choice of resources on the basis of divergent goals will soon become as different as the proverbial apples and pears. But the range of differences in children is at least that great and so is the range of their preferences.

Equality would not become irrelevant or disappear from a system of sub-units pursuing wildly different aims by wildly different means. The focus for discerning equality would simply shift away from the substance of educational resources to the power to purchase them, away from the output of the unit and towards the fairness of the process.

### What can be done now?

The problems posed by differentiated educations for different children are political problems and tracking is a political solution. So too is the system suggested here.[16] It is not a system that will commend itself, to say the least, to either school personnel as an immediately worthwhile structural reform or to judges as a court-imposed remedy to specific institutional abuses in tracking schemes. But while waiting for this revolution in American education, lawyers can play a critical role in breaking down the current school practices which allow and even cause the abuses in current tracking schemes.

First, lawyers can police current grouping practices on their own terms, making sure that they operate in ways that are true to their own declared intentions and principles, thus building badly needed accountability into an allocation system that has never allowed for it. By acting as surrogates for power that may someday devolve on the sub-units actually affected, lawyers can serve worthwhile notice on school administrators that the power to control the amount of education a child will be exposed to is not absolute. Arbitrary and sometimes punitive shifts in grouping assignments have definite legal implications. Children having nothing more than a personality conflict with their teacher are demoted to groups where provision of less education is expected to resolve that conflict, as though a disagreement with a teacher constituted resistance to being educated. Information about the way particular school systems make grouping decisions is rarely available to the public. Indeed, parents are rarely aware that the system is organized to provide more education to some children than to others; nor are they aware that their own children have been subject to such decisions; they are not aware because the system has made no effort to inform them. Such decisions are of critical interest to parents and children; if the school system chooses to channel children in these ways, then, at the very least, it should be required to make the process as open as possible. Lawyers can assert that right for parents and so begin to establish communication between the school and the parents while exposing one critical aspect of education to the light.

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# PRINCIPAL POWER

By Stephan Michelson

**The average expenditure per pupil at School A is the same as at all other schools in the district. A's building is old, however, and heating costs are twice the average for the district. The parents at A want the school board to *raise* the per pupil expenditure because they consider equal dollars unequal in their case. The school board is not uncooperative. It asks several experienced teachers to transfer to the school to replace younger (and less well paid) teachers there now. The experienced teachers threaten to resign rather than teach at A. The school board then states that it is providing the best education it can and that given the equal expenditures it sees nothing else it can do.**

**Four teachers have called in sick today at School B. The principal, Mr. Yossarian, has been on the phone for an hour trying to get substitutes. So far he has found only one teacher willing to come to B for the $22 the school board provides for substitutes. Mr. Yossarian faces the situation calmly; it happens almost every day. He makes his usual adjustments: doubling of classes, enlarging the "study hall," and assigning his assistants to teaching. Mr. Yossarian is disturbed by the board's policies on substitutes. The board is, in effect, offering him three "vouchers" worth $22 which can be spent only on hiring three teachers for a day's work. The money cannot be spent on any other resource. Since over the 180-day school year there are some 360 teacher-days of unfilled teaching positions, Mr. Yossarian feels that $7920 is being held out before him while his hands are tied behind him. Why should the board offer him that money for resources he cannot buy but refuse to let him spend it on resources that he could attract to the school?**

**Schools A and B are holding operations; teachers there do the best they can under difficult circumstances. School C, however, is a "good school." Today the teachers have come early to discuss the mathematics curriculum. Some teachers prefer to use highly directive techniques with all the children following a fixed sequence of instruction. Other teachers prefer to let pupil interest determine the order in which the materials are taken up. The teachers are also divided (differently) on how best to teach. Some favor rote learning and the development of arithmetic manipulation skills; other teachers prefer to concentrate on developing mathematical understanding, even at the cost of developing less ability in adding, subtracting, multiplying, and dividing. This morning's meeting, however, is to reach agreement among the faculty on advising the director of elementary mathematics instruction, who, after visiting all the schools in the city, will choose one text and one set of materials for use in all schools by all teachers for all children.**

Most of the many arguments offered for decentralization of authority over the public schools have little to do with education. Although the arguments for decentralization are cast in educational terms, their content is really political. The fights are over what is taught in the schools, not over how successfully it is taught. Equality in some simple measure of resource allocation is often sought when "fairness" might call for deviations from strict equality. Only the broadest of educational issues are discussed. While I respect and agree with this focus, I am concerned that it might foster the impression that there are no arguments on narrow (say, achievement test) grounds for some sort of decentralized educational decision making. There are such arguments, and they suggest a simple change in school operations which seems educationally superior to the present structure and more feasible politically than most decentralization proposals. As much for alliteration as for accuracy, I call the scheme *principal power*.

First, let us look at the problems, as presented above, and then at the solution. The argument at School A, that heating and other maintenance costs should not be averaged in with "educational" costs, is probably widely acceptable. The idea is that students should be provided with equal comfort, not with equal expenditures on comfort, and that equal comfort should be provided before educational resources are allocated. Otherwise, School A is almost literally put in the position of burning schoolbooks to keep the children warm. Present accounting systems usually provide the information needed to separate, roughly, the costs of the *conditions of education* from the costs for *educa-*

*tion*. This information is seldom available to the public; at present, there is no incentive for the central school board to release it. The more school-by-school numbers the board provides, the more parental complaints it invites. Any proposal for restructuring the school system should contain, then, both a means of determining what should be measured when equality is being considered (such as heat as opposed to expenditures for heat), and an incentive to inform the public in a way which will promote solutions to problems, not just complaints. Keeping these criteria in mind, we turn to School B.

It is strikingly obvious, once it is put down as above, that the offer to replace the regular teacher with $22 worth of school resources should be applicable to *any* resource. It makes particularly little sense to demand a specific resource when the availability of that resource is not equal for all schools (hence, for all children). If there were no other change, offering the principal of school B $22 to spend however he deemed best would seem more reasonable than insisting that he spend it either on an approved warm body or not at all. He might decide to bring in an unapproved person, who might be a reasonably good substitute; or he might want to buy materials. Why should he do without *any* resources because he can't get a specific one?[1] Knowing his school's situation, he could plan ahead—spend several thousands of dollars preparing a special room for "teacherless" days. He could even arrange for his regular teachers to be "sick" on schedule, to the extent that sick leave in some schools is, in fact, an approved way of taking a break from the school. He could then hire an additional regular, but roving teacher, with the substitute funds.

But this means that the principal has all the substitute money at the beginning of the year, to dispose of as he wants. And if the substitute money, why not the other moneys: the teacher salaries, the materials, custodial salaries? Why should one mix of teachers and materials be required for all schools? "After all, instruction is a vehicle through which the purposes of education are executed. If the vehicle is not appropriate, these purposes will not be served, no matter what is said about maintaining standards." [Taba and Elkins, p. 24.]

### Do they want power?

There is no reason to believe that materials should be the same for all pupils, or that the teachers should be allocated without regard for the particular children they will instruct. Although one might engage in an extended discussion of the appropriate structure in which to make the best decisions about choosing particular resources for particular groups of children, no such discussion is necessary here. Once we understand that school committee offers of expenditures do not always become expenditures, the solution is obvious: let the principal spend the money himself. Give the principal a budget based on his enrollment and his "needs," and leave him the opportunity – and burden – of particularizing his school to his clients, his pupils.[2]

This leads to the princpal's control over the specific teachers he has, their duties, their materials, and so forth. I use the word "control" in the nominal, or legal sense. I do not intend that a principal should be a dictator, but neither do I think he could be. I do not have the space here to outline the process by which nominal principal power could end in much broader decision making, involving the staff and the community. Much of the principal's power over parents now, however, emanates from his argument that most crucial decisions are out of his control: he is more like a foreman, organizing the materials given him, than like a plant manager. Certainly many principals would not want principal power both because they can dismiss parents more easily now, and because principal power would eventually *diminish* the power of principals.

### What is gained?

Now the question is: What educational advantage is to be gained from such a structural change?

There is no doubt that the specific outcomes which are desired from schooling differ among segments of the population. I will avoid here a discussion of the merits of different ways of determining which outcome goals a child should be subject to. It is clear that some parents, those who can afford private education, get to choose elements of their children's education (including the values espoused), whereas other parents do not. But it is arguable whether the solution to this inequity is to allow all parents to choose their children's school, or to allow no parents that choice. For the sake of this short article, let us assume that all goals are the same.

If the appropriate techniques (and styles) of teaching differ among children by some background or other measurable characteristic, and if children are homogeneous within schools by this characteristic (relative to the school district), then the resources going to each school should differ to take account of the differences in the children. The concept that appropriateness of resources differs, for the same achievement goal, I call "specificity."[3] I have shown in a very broad way, by after-the-fact estimation of the relationships between resources and outcomes, that teacher specificity may obtain between blacks and whites. That is, those teachers who are "best" for whites are likely to be different from those who are "best" for blacks, because black and white children respond differentially to various teacher characteristics.[4]

Let me emphasize that this specificity does not depend on the expected outcomes of the schooling. Surely a trade school would have different teachers from an academic school. Surely a community of artists would emphasize different things in their schools from a community of coal miners. That is not an issue here. I am holding constant such differences. The question is, *if* the artists' children and the coal miners' children were expected to achieve the same (say, academic) goals, *then* would the same set of resources (procedures, etc.) be best for both groups?

A good deal of evidence accumulated in the past

twenty years favors the specificity concept. Perhaps its first popular recognition should be credited to Frank Riessman who noted that poor children did not respond to the techniques of an apparently successful, but middle class, nursery school.[5] Miriam Bar-Yam has compiled an extensive review of research literature concerning the most appropriate method of teaching a particular subject to different kinds of children. Lesser, Fifer, and Clark; and Stodolsky and Lesser have shown that some learning characteristics were associated with ethnic background. Eric Hanushek, investigating reading scores of third-grade children in a district in California, found no statistical connection between school inputs and the scores of Mexican-Americans, although there was such a relationship for Anglos. "The system has not been able to provide the type of instruction necessary for these children," he writes. "Standard teaching methods do not seem to be appropriate in this case." [Hanushek, p. 29.]

At present, this research is little more than suggestive, but what it suggests is that the best way to teach different kinds of children the same subject is with different combinations of resources, different techniques, different instructional materials, and different styles. Thus, we see that the problems of Schools A, B, and C are the same, in that they stem from the structure of a system which does not encourage, or even allow, specific associations between resources and children.

### Resources for Children

The problem then is finding a mechanism for associating the appropriate resources with each child or group of children. What is interfering with this match-up now? The schools of today are designed to inculcate a "conventional wisdom" embodied in a standardized curriculum, effectuated with traditional methods, with traditional social relations between adults and children, and with traditional types and quantities of various resources. But for many children, these standard, government-issue items simply do not fit.

The simplest way to accommodate resource specificity—the difference in appropriateness of resources by children's characteristics, for the same outcome—is by removing the decision about resources to a level where there is knowledge about the characteristics of the school and its pupils, the availability of resources (i.e., their prices specific to that school), and educational technology. I do not pretend that all, or even most principals today have the requisite skills and knowledge to handle this scope of decision making. But surely the central school boards do not. At least the principals would have some chance to learn about their children, and act, if instead of a given mix of resources and limited vouchers, they had more freedom to vary the structure of their schools.[6]

What would happen if principal power—budgets to principals—were adopted tomorrow? In most cases, very little. Most principals would continue to organize their schools the way they do now, because that is all they know. In those cases, no harm done. Most of these principals, however, would eventually either leave their jobs or gain more skills, as the pressures for specificity mounted. Other principals would act right away. Principals of schools perpetually in need of substitutes, for example, are well aware of the paradox of being offered money which they cannot spend. They would welcome a commitment to the funds regardless of their ability to attract temporary personnel.

### Improving the breed

Perhaps the most important though long range consequence of principal power would be the personnel attracted into school administration. The responsibilities and freedoms implied by this scheme would certainly attract a different breed of principal, especially if the route to becoming a principal were also changed so that people with the requisite abilities would in fact be able to become principals. As this point demonstrates, principal power should not be considered alone, but should be accompanied by other structural changes such as the relaxation (or abandonment) of teacher accreditation, the development of a process for choosing principals based on their abilities, not their tenure, and new methods of communicating educational technology to decision-makers. However, a virtue of the proposal is that it could be effectuated without these concomitant reforms, and not only work, but generate pressure for these measures. Even the teachers, the guardians of the standards of their profession, would probably prefer an unaccredited substitute to no substitute, or a "no-teacher room" to chaos, once these options were within reach.[7]

Last, we have the question of feasibility. Would a public resentful of the idea of local control accept principal power? Possibly. In fact, this could be seen as simply an administrative change, to promote efficiency in decision making. We have in education today, as one writer observed (with reference specifically to New York City), "the classic symptoms which would prompt any healthy organization to turn to decentralization." One of these symptoms is "futile efforts to lay down binding general laws for diverse populations." [Tuckman, p. 15.] Any business which suffered diseconomies of scale would decentralize. General Motors, for example, is a confederacy of autonomous divisions. What is such an obvious procedure in the private sector is a major political struggle in the public sector, for reasons which require no detailing here.

Principal power does not have all the emotional overtones of redefining the political unit. It does not deal directly with changes in the goals of schools, because it does not require different goals for its defense. Foes of community control therefore *could* accept principal power, though they might not. Friends of community control also could embrace it. It is a step in their direction; and with good community organizing, it could be a big step. The burden would fall on the community leaders to exert effective pressure on the principal to make structural changes that the community wants. This is a good incentive for organization. But, again, it is not directly putting the power in the hands of the community organizers, and for

this reason might be acceptable to people who would oppose going that far. Principal power is no utopia. It is not the answer to most of our public school problems. It will be no one's most preferred plan. But, where there will continue to be a central school board, and where pupils are essentially segregated by background, it could be a constructive move toward relating schools to the children (and teachers) they serve.

## FOOTNOTES

1. An analogy can be made with licensing of medical services. Although licensing is supposed to protect the consumer from incompetent medical care–and certainly does so in many cases–it also prevents people who could have *some* care from having any. Although we would like all births to be managed by a doctor, is it really better to have no help than to have, say, an experienced midwife? See Fein.
2. Determining equal resource allocation is not easy, and is made only a little easier by granting budgets instead of resources. See [6]. Principals, however, will be more candid in detailing expenditures per school than school boards currently are, both because they will want to justify additional expenditures and because the school committee will demand strict accounts. In principle, the school committee would provide the facilities and conditions for education equally–in school A's case, a well heated, well lit building–and then budgets for teachers and materials. In practice, of course, such distinctions are not so easily made. What is a principal wanted a lesser building and more money for teachers?
3. See Michelson (1969) for an extended discussion of this concept.
4. Michelson (1969) considered achievement test scores as the criterion of success. Howard Tuckman has recently shown the importance of interactions between background and school factors when school continuation is the success measure.
5. See Riessman. One might be tempted to trace specificity back to John Locke, but this would confuse specificity–the application of specific educational methods needed to deal with children as they are–with segregation. Locke advocated differentiated teaching methods for different social classes whose children would lead different kinds of lives. Specificity as a concept does not necessarily imply either segregation or integration by class, race, or sex, but leads to an empirical determination of the best ways to produce the desired goals, both in achievement and in values.
6. A mechanism of distribution that has been suggested is to let the children choose their materials, and even their teachers. See Dennison. However, even here, an infinite variety of material cannot be available. At some point some adult must make some decision about the structure and resources available to children, even if the children will be free to choose from among those resources.
7. This applies to teachers as individuals. As a group, teachers will always see their wage demands competing for funds with other demands, and they will therefore oppose alternative uses of these funds.

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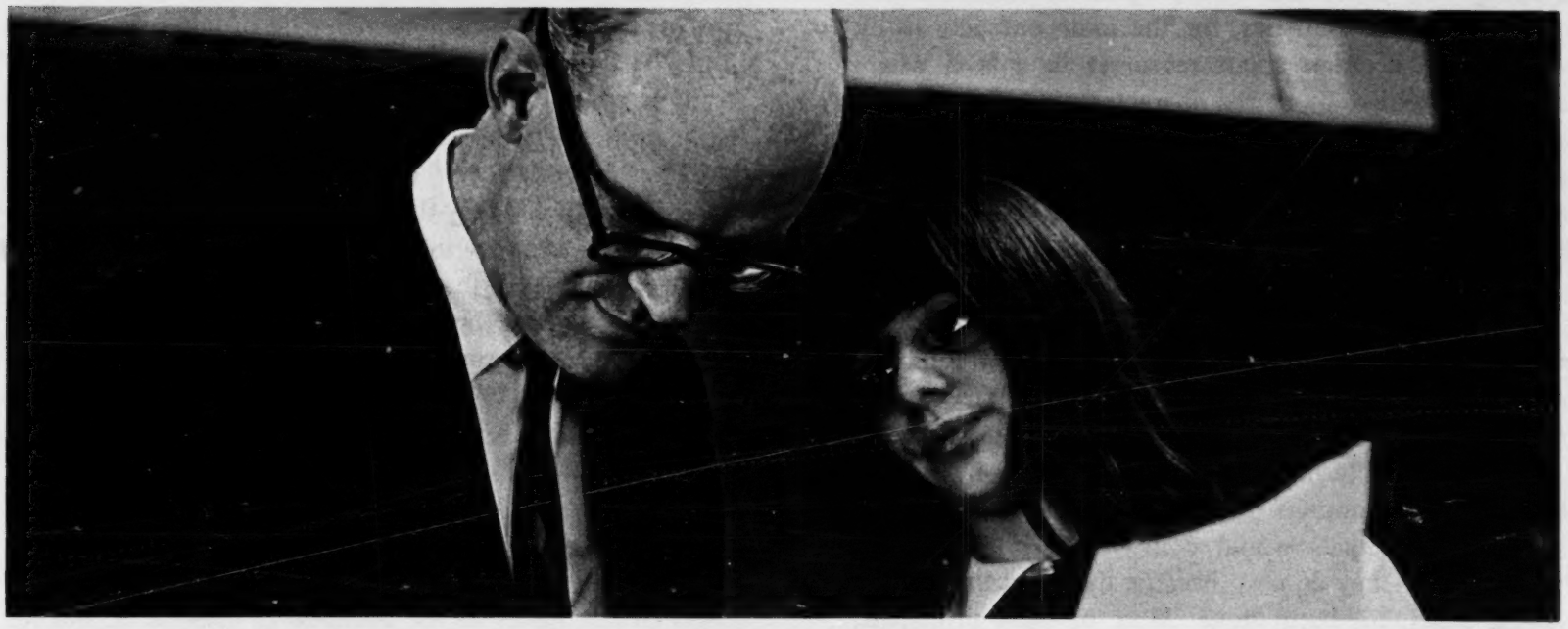

Photo by Stefan Filipowski

**Principals may not always know what is best for their schools but they have information not available downtown.**

# TITLE I AND EMPOWERMENT: A LITIGATION STRATEGY

by Mark G. Yudof

The inadequacies of American education are often thought to stem from a lack of resources, or, better yet—to use traditional liberal analysis—to stem from a malapportionment of resources which discriminates against minorities and the poor. The corollary of this view is that laws and lawsuits are a peculiarly appropriate means of effecting social changes—in this case, the more equitable allocation of dollars and services. The problem with this analysis is that it is not dollars but the quality of programs, the distribution of resources within schools, the choices among the various educational alternatives that are crucial to the needs and expectations of school children. More dollars may contribute to the resolution of the urban education crisis, but fundamentally, that crisis will not be resolved until public educational institutions are restructured in such a way as to make them responsive to the needs of the poor.

Title I of the Elementary and Secondary Education Act, with the exception of one abused provision, ignores the necessity for institutional change in favor of the traditional premise that educational disadvantages can be dispelled by the application of resources. And Title I has not worked. It has not worked because its dollars and programs have been administered through the same old bureaucracies with their vested interests in personal power, security, and money. And it will not work until the quality of the programs it finances has been substantially improved. This will not occur without a reformation in the politics of education. A power structure that excludes the poor, both parents and students, from its decision-making process is systemically incapable of creating and executing educational programs which will significantly benefit poor children. The assessment of educational needs, the ordering of priorities, and the evaluation of results must involve the consumers of the services, those who have the greatest stake in the outcome of the educational process.

Where white and middle income people exclusively control a school system, inertia and apathy, if not a more invidious discriminatory policy, make recognition of the differential needs of disadvantaged children[1] unlikely.[2] Black schools governed by whites are inherently unequal to white schools governed by whites.[3] Schools with high concentrations of poor children which are exclusively controlled by middle class administrators will not meet the needs of those children. Therefore, in evaluating litigation strategies designed to ameliorate intra-district resource disparities in education, the focus must not be on particular inequalities or particular misuses of funds. Rather the essential questions are: How will this litigation affect the quality of educational offerings; and, to restate the same question in control terms, to what extent will parents and students and the community be able to assert their educational priorities on an unresponsive school administration.

The consideration of Title I lawsuits in the context of enhancing the quality of programs and altering power relationships inevitably leads to the conclusion that a court order to compel districts to concentrate and target funds in accordance with the law, to refrain from treating Title I funds as general aid, and to provide comparable services as between target and non-target schools prior to the imposition of Title I funds alone will not bring about significant changes in the education of poor children. Irrespective of such judicial decrees, the same power structure and the same bureaucrats will administer the programs. Indeed, Title I contributes barely $100 per participating child, which is simply not enough money to make a difference, no matter who administers it. Further, the courts are unlikely to choose to monitor, on a day-to-day basis, the carrying out of their orders. Courts have neither the time, the will, the taste, nor the expertise. The fundamental question then is what results might flow from Title I litigation which would justify the tremendous amount of effort required to bring such suits.

### Insiders Expertise

Title I litigation may serve a useful purpose in piercing the veil of secrecy and phony expertise which frequently surrounds the educational process. Like the hospital operating room, the police station, and the automobile mechanic's garage, the schools are run by mystagogues, and the filing of a Title I law suit, based upon prima facie violations of the ESEA, allows the initiation of legal discovery, including the taking of depositions and interrogatories, and the production of documents. There is a good deal of information which can be obtained in this manner.

1. Under Guideline #54, public citizens are entitled to review all approved Title I project applications, including supporting documents such as correspondence and equipment inventories.
2. Under Guideline #46 and #46-A, parent advisory committees should have access to unapproved project applications on the theory that there cannot be meaningful parental participation if parents are not able to review programs until they have been finally approved.
3. In order to determine whether Title I monies are being targeted properly in accordance with Regulation #116.17(d), i.e., not used as general aid, school districts should be compelled to list the employees whose salaries are paid, in whole or in part, from Title I funds, and to specify the school to which each was assigned and the duties which each performed to benefit Title I eligible

children.

4. The present location of each piece of equipment purchased from Title I funds should be specified in order to determine whether the equipment is being made available to all children or only to Title I eligible children. See ESEA Title I Program Guide No. 44.
5. Title I parent advisory committees should have access to test results and program evaluations in order to fulfill their obligation to recommend programs which meet the special needs of their children. See ESEA Title I Program Guides Nos. 46, 46A.
6. In order to establish that target schools are providing services which are comparable to services in non-target schools, the school district is obligated to provide school by school breakdowns on teacher salaries, administrative salaries, secretarial salaries, library and textbook expenditures, and equipment and construction expenditures. §109(a)(3) of Title I, ESEA (1970 Amendment).

If the information outlined above can be obtained through Title I litigation, the community has a superb weapon with which to compel school administrators to make qualitative changes in programs; the publicizing of the school system's inability to educate and the disclosure of irregularities in the administration of federal funds will embarrass the educational bureaucrats. Further, such revelations may undermine public confidence in the educational power structure to such an extent that the door may be opened to community participation in the decision-making process.

### Sand in the Machine

Aside from the informational aspects of Title I litigation, the threat of a law suit, if well-timed, may give the poor bargaining power to affect program changes—even though those changes may be unrelated to the legal basis of the suit. The trauma of litigation, the inconvenience of depositions, the fear of adverse publicity, and the costs of defense may well make school administrators more amenable to making concessions. Conversely, a Title I law suit may prove to be a rallying point for the community, a catalyst for an organized community effort to tackle educational problems. Litigation affords community people, who have been frustrated by their inability to affect educational decisions, a concrete means for questioning the authority of the so-called educational experts. It also affords them an opportunity to formulate specific grievances and to concentrate on specific issues. Vague, inexpressible notions of the inadequacies of the welfare system did not generate the community activism that the simple phrase, "$5500 or fight" produced. Similarly, the simple idea that poor children are being cheated out of Title I dollars and services earmarked for their benefit is a far more effective basis for community action than an amorphous feeling in the community that schools are somehow not doing for poor children what they should.

In school districts where the administrators have failed to make even the usual superficial effort to involve parents in the Title I program by establishing a Title I advisory committee, a Title I law suit may be used to compel the establishment of such a committee on a basis which is far more favorable to the community than it would have been if the school system had acted on its own initiative. Where there is an on-going advisory committee composed of people sympathetic to the school administration and para-professionals who have a vested interest in the status quo, the reluctance of the judiciary to intervene in day-to-day educational governance may make it difficult to argue that the realities of the composition of the committee belie the outward forms of meaningful parental and community participation. On the other hand, where no advisory committee exists, plaintiffs in the litigation, by virtue of having raised the issue, may well have standing to propose to the court a particular institutional structure and a particular method of selecting committee members. Needless to say, an effective Title I advisory committee which forcefully enters into process of making programming choices and which monitors the activities of the school system is a significant step toward effecting the power transfers which are essential to the improvement of the education of the poor.

Another reason to adopt a Title I litigation strategy is that a law suit might well compel state and local educational agencies to adopt regular procedures for the review and approval of Title I project applications. Often there is a mystical and secretive process for channeling Title I proposals through the bureaucratic power structure, a process which remains unknown to those who are most directly concerned with the education of poor children—the children, the parents, and the community. Title I litigation can also have the effect of publicizing the stages in the process—the specific dates of each review and the names of the reviewing officials—whereupon parents would be able to make timely objections to the approval of particular programs. Further, it is not unreasonable to establish the principle that public hearing should be required at each level of consideration. Armed with detailed information on the Title I programs, cognizant of the steps necessary to gain approval for projects, and given some access to the approval process, parents and community groups may have leverage to affect program decisions.

Title I litigation may provide parents and the community with a forum from which to make counter-proposals for the programming of Title I funds. If the litigation has the effect of undermining the court's confidence in the ability of the school administrators to formulate and execute programs which benefit the poor, then the court may be receptive to the community's notions as to what constitutes an effective program. Given such an opportunity, a plan could be submitted which would bypass the normal bureaucratic channels for the implementation of programs. Further, a counter-proposal would provide the court with some standard against which to evaluate the school district's programs, and possibly the school board could be required to review the community's proposal and to give written reasons for refusing to adopt it.

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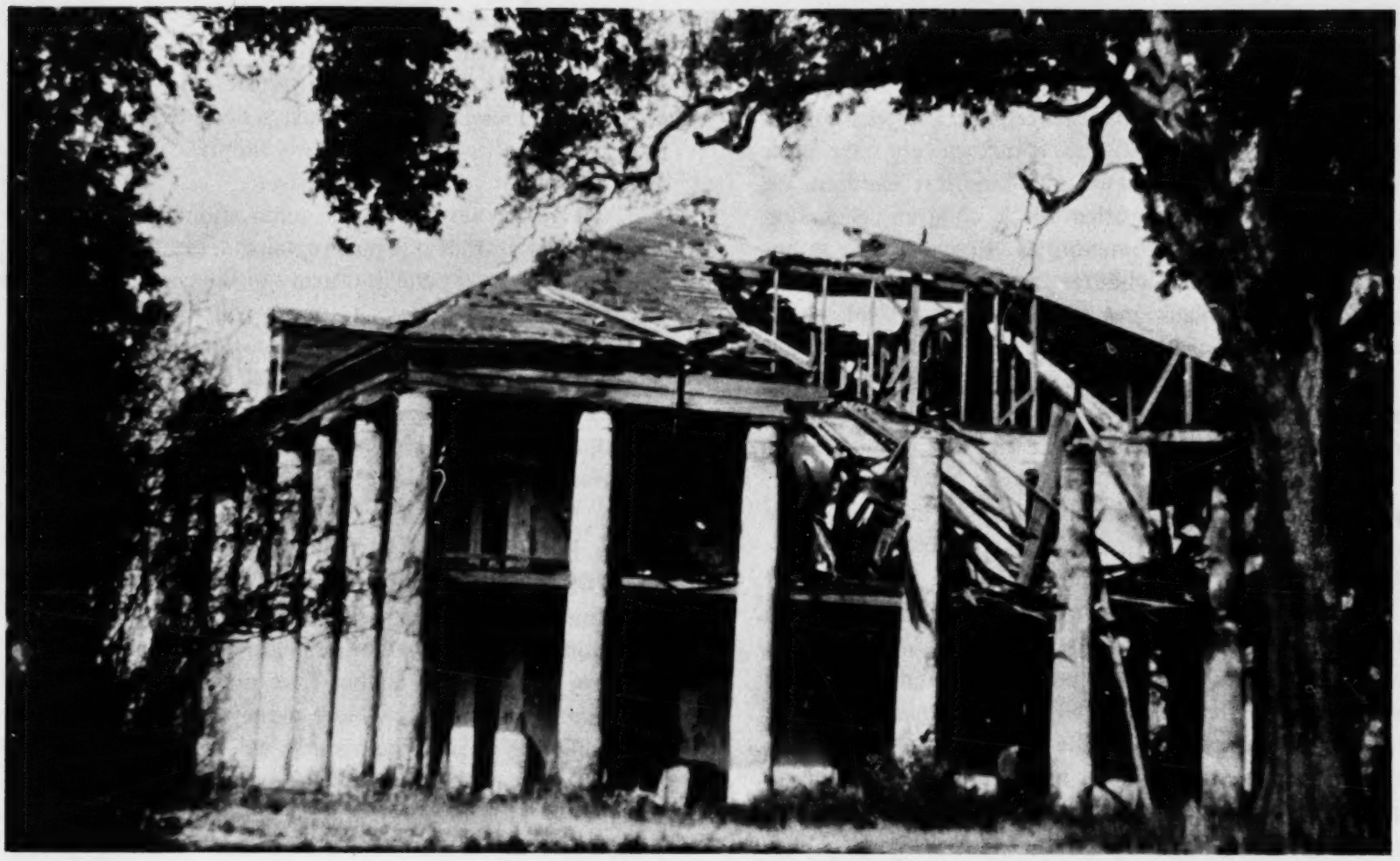

Photo by Mark G. Yudof

Mississippi Integration

# FROM INTRANSIGENCE TO COMPLIANCE IS TWO STEPS FORWARD AND TWO STEPS BACK

by Rims Barber, Delta Ministry

"For all practical purposes, the dual school system as it has existed in the South will be eliminated by September 7."

Jerris Leonard
Assistant Attorney General for Civil Rights
June 9, 1970.

School desegregation (or, at local option, some mutation thereof) is not only the law of the land, but by September it will be the law of Mississippi as well. All school districts in the state should then be in some form of compliance with *Brown v. Board of Education* and its executive, judicial, and legislative descendants.

For those of us who saw school integration as a process that would humanize an institution that had been dehumanized by segregation, recent events have been extremely frustrating. We had hoped to see black and white brought together in an arena where both could interact in tension and freedom. But desegregation is being implemented under the almost complete control of the same people who enforced segregation. After a court or the Department of Health, Education, and Welfare acts, black people are no longer heard. They are left to be shuffled, cut, and stacked at the whim of The Man. This process is called implementation, and it is through implementation that the plaintiffs who have just won a judgment in favor of their civil rights can lose their human rights.

The results are not yet completely in, but it is clear that Mississippi's vaunted "way of life" is still alive and still kicking. What follows are some details gathered by the Delta Ministry on just who is getting kicked, and how.

Black teachers are being emasculated and stripped of their standing before their own communities. Teachers with years of experience are being assigned as teacher aides or assistants to white teachers. New job categories are created; black Mississippians will explain to you that "Co-principal is short for colored principal."

Black teachers are being fired. We estimate that more than 15 per cent of the 9500 black teachers in the state will be out of work next fall. Ruses like requiring teachers to score 1000 or more on the Graduate Record Exam are common, even though the test was designed to find good graduate students, not good teachers.

The schools are being isolated from the black community. Parent-Teacher Associations are being dropped. Schools that once served as community centers are now closed as soon as the school day is over. Extra-curricular activities of all kinds are being eliminated.

Black people get the message: The schools aren't yours any more.

Every effort is being made to beat down the spirits of black children. Individual teachers who had tried to give their classes some sense of their black culture have been told to stop. In some cases, the brightest children are tracked separately from other black children, alienating them from their own communities. Resegregation is another way that black children are reminded of "their place." Although black and white children attend school under the same roof in many systems, the roof is literally all they share. Separate, labelled water fountains can still be found. One system has even gone so far as to install "white" and "colored" bells. White children change classes on the hour and black children change on the half-hour. Although it is difficult to document, it appears that one by one the older, brighter, and more self-assured black students are being forced to leave school through strict enforcement of rules on length of hair, on tardiness, or on other non-educational matters. Those who manage to graduate then have the opportunity of attending Mississippi Valley State College, where 900 protest marchers were arrested in one sweep; or Ole Miss, where more than three-quarters of the school's hundred-odd Negroes were expelled after a campus protest; or Jackson State.

In the meantime, whites are fleeing to private schools without loosening their control over the public schools. Elections this spring in some districts with hardly any white children remaining in school saw white turnouts far above that of previous years. Tax rates on both the state and local levels are threatened as well. Furthermore, the Delta Ministry is investigating solid reports that private school teachers are being paid out of public funds in some towns, that white children who transfer to private schools are being encouraged to take their schoolbooks with them, that certain school materials are simply "missing," that Title I money is being spent illegally.

People have heard so much about what is wrong with Mississippi that one more catalogue of injustices is not likely to impress anyone, but many of the conditions I have discussed here can be traced directly to the official attitude of the federal system. The courts continue to operate on the assumption that defendants will show good faith in their every action despite the record. The guilty are expected to reform themselves and enter, unassisted and unhindered, into that state of grace called compliance.

Federal administrative agencies follow the same course. Indeed, the recently announced programs to "facilitate" desegregation go further. Existing OEO and HEW programs designed to help the poor (and offering a modicum of control to the poor) are losing their money to southern school districts that have not desegregated after 16 years of enforcement. More money will be provided in the following years. The money will go to teach white teachers how to act around black people, to make black schools fit for white children, and for sundry other programs designed to "ease the burden" of desegregation. Nothing is allocated to ease the burden that must be borne by every black child who must attend schools in Mississippi and in the other Southern states, some of which are distinguished from Mississippi only by better manners and subtler tactics.

# THE SUPREME COURT & VISIONS OF REGRESS
# A REVIEW

**by David L. Kirp**

Alexander M. Bickel , *The Supreme Court and the Idea of Progress* (Harper & Row, 1970, 210 pages, $6.50)

In discussions of race and educational policy, Alexander M. Bickel is ubiquitous. Pick up almost any issue of *The New Republic*, or watch "The Advocates" television debate concerning integration, and Bickel resides, urbane, composed, meticulous in his concern for the limits–if not the potential–of the law. Attend closely to the language of Richard Nixon's desegregation pronouncement and the spirit of Bickel resides there as well, counselling caution, sharpening legal distinctions between *de facto* and *de jure* segregation, concerned about regional racial policies, ready to accept the good faith gestures of schoolmen South and North. With North Carolina Representative Richardson Pryor, Bickel has drafted and had introduced legislation which embodies his views. In sum, Alexander M. Bickel is a presence to be reckoned with.

*The Supreme Court and the Idea of Progress*, an expanded version of the Holmes Lectures that Bickel delivered at Harvard this fall, is a progress report on his war with the Warren Court. The book is largely devoted to a dissection of Supreme Court decisions affecting school segregation and elections.[1] In these areas, Bickel views the Court as committed to "broadly conceived egalitarianism" (P. 103), heedless of differences that, to Bickel, would warrant judicial line-drawing; he attacks also the logical capacities of the Court, concluding that it "relied on events for vindication more than on the method of reason for contemporary validation."(P. 12)

The Bickel critique, taken whole, does not afford a basis for building a rule of reason. To be sure, some of his objections–to the retroactivity doctrine indulged in by the Court, or to the aberrational *Ginzburg* decision–are well taken. But when he deals with school policy, Bickel is too concerned with constituency-formation and with his own preferred alternatives to be particularly helpful.

As a judicial critic, Bickel is a consummate armchair politician. He believes in the art of the practical,

and would have the Court tailor its constitutional forays to satisfy the practical. ". . . .[B]efore committing itself to a principle which may have to remain abstract, or worse yet, be repudiated, the Court is well advised to test public opinion, since it can better suffer the kind of withdrawal that consists of not going forward than the kind that consists of visibly retreating."(P. 95) Bickel's observation is in several ways remarkable. He conjures up a vision of the Supreme Court as Super-Gallup, acting only when the majority is similarly inclined, retreating when public sentiment would so have it, regardless of the importance and the rightness of the rights at stake. Had the Supreme Court accepted this argument, it never would have ventured into the morass of reapportionment, risking the threat of a constitutional convention brandished by Everett Dirksen; nor would it have dared the Southern temper by declaring school segregation constitutionally repugnant. Furthermore, Bickel's exhortation, taken seriously, undermines the very reason for maintaining an independent judiciary: that the Courts can take unpopular but nonetheless right decisions, and that their capacity to act on their constitutional convictions–not on the last election returns–assures them a respectful audience.

### Straw without Bricks

On desegregation, Bickel employs a familiar debater's tactic. He envisions a future that none of us would find acceptable: "exclusive compulsory free public education," (P. 124) dedicated to an "equalizing, socializing, nationalizing–assimilationist and secular–mission."(P. 121) He then proceeds to demonstrate that Supreme Court decisions will, if carried to their logical conclusion, lead us to this end, and from that demonstration chides the Court. Yet the demonstrations are so hyperbolic and misleading that they fail to sustain the argument; they suggest that Bickel's concern lies elsewhere, with the making of a "counter-progress."

Bickel's analysis of judicial policy concerning desegregation commences with:

> a distorted mirror image presented in the Ocean Hill-Brownsville District of New York during the teachers' strikes of the fall of 1968. A decade earlier, black children in Little Rock, Arkansas, and elsewhere in the South were escorted by armed men through unfriendly white crowds to be taught by white teachers. In Ocean Hill-Brownsville in 1968, white teachers had to be escorted by armed men through unfriendly black crowds to teach black children.(P. 117)

From this incident, Bickel proceeds to consider the implications of *Brown* and its progeny. He finds that those decisions require centralized and homogenous schools, a viewpoint at variance both with black concern for community control and racial identification and with the politics of urban school governance; a viewpoint headed for "dread word–irrelevance."(P. 151)

Of course, although Bickel does not say so, Little Rock and Ocean Hill-Brownsville are not the whole of the desegregation story; they are not even a very substantial part of it. Why not discuss the numerous Southern towns where racial moderates, black and white, goaded by judicial pressure, have been able to disestablish dual school systems, and in fact integrate their schools? Why not note the Evanstons and the Berkeleys and the Teanecks, the Northern cities (surely more typical than New York City) that have sought affirmatively to integrate their public schools, and have done so with remarkable success? Why not? Because it undercuts the argument.

On the inevitability of school centralization, Bickel is also dead wrong. The Court's insistence that black school children be in fact able to attend integrated schools implies nothing about school governance; indeed, the Detroit school board's decentralization plan, announced in April, promises considerably *more* integration than a centralized Detroit system has been able to achieve. Bickel would have us believe that the "one man-one vote" decisions foreclose decentralized control over school policy. He offers no explanation for this assertion, which flies in the face of New York's attempt to decentralize while enfranchising local communities with substantial (and constitutionally permissible) voting power.

Similarly, Bickel argues that *Poindexter* and the other Southern decisions striking down tuition vouchers effectively foreclose another route to educational diversity: funding private schools. He fails to mention the extended history of Louisiana hostility to *any* integrated education, a history that made a finding of bad faith inevitable in that state's effort to fund alternative schools. In Louisiana, choice–however artfully framed by statute–was a chimera, rightly and forcefully condemned by the Court. That condemnation would not necessarily pertain in another state, where tuition vouchers were not a code word for Citizens Council schools.

In sum, Bickel does not demonstrate that the Supreme Court's decisions require that there exist only public schools, and only forcibly integrated public schools. Justice Brennan's observation in *Schempp*, dismissed by Bickel, still stands; the First Amendment forbids the state "to inhibit" the individual's choice "between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own."(P. 125)

### Encouragement of Segregation

Bickel's chief concern lies not, in the end, with armchair judicial criticism, but rather with alternatives, might-have-beens (or might be's). He would criticize the past to remake the future in his image, and the similarity of that image embodied in his legislative proposal, and current Presidential policy, with its solicitude for reactionary Southern voters, bears critical attention.

Bickel's bill proceeds from Congress' power to enforce the Fourteenth Amendment, under Section 5 of that Amendment.[2] It would permit school districts, after having formally disestablished dual school systems and permitting majority-to-minority transfers to those students

who wished to exercise the option, to adopt a neighborhood schools policy with separate and measurably equal schools for all schoolchildren.

The Bickel statute places enormous emphasis on the distinction between "intentional" and "actual" segregation, disallowing the first, while encouraging the second. Yet, as *The Supreme Court and the Idea of Progress* makes plain, black children are not "going to make fine distinctions about the source of a particular separation."(P. 119) Moreover, the operative term "intentional" is itself so ambiguous as to provide little guidance to school systems. Where a school system fixes school boundaries or builds new schools, with the result that the schools thus created are predominantly black, is the segregation not intentional? How, indeed, can a school board act, without being charged with the consequences of its actions? As the district court in *Davis v. School District of the City of Pontiac* (E.D. Mich., 1970) put the point:

> where the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation.... Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation.

In *Davis*, the court enjoined Pontiac's construction program until the school system could put forth an acceptable plan; such a plan has apparently been filed. The Pontiac, Michigan, situation suggests the feasibility in small and medium-sized cities of educational arrangements which effectively alter the existing pattern of separation, which press for integrated classrooms where possible rather than settling for a *Plessy* "separate but equal" allocation of students and resources.[3]

Bickel's criticism of the federal bench—"all too many federal judges have been *induced*[!] to view themselves as holding roving commissions as problem solvers"(P. 134)—is misplaced. It pertains more aptly to Bickel than to the Warren Court; the difference between them is that the Court has come to stand for an "idea of progress," while Bickel would have us settle for a cautious judiciary embodying the rather particular reality of regress.

**FOOTNOTES**

1. Surprisingly enough, Bickel has little to say about criminal procedure cases, a third area into which the Warren Court made bold to secure constitutional rights. Bickel's grudging acceptance of *Miranda v. Arizona*—"a radical, *if justifiable*, departure from prior practice"(P. 49)—suggests an explanation for this omission; the critic, having nothing to criticize, holds his tongue.
2. Whether that power justifies undoing Supreme Court decisions is, at best, debatable; it is surprising (if one expects consistency between Bickel the critic and Bickel the legislative draftsman) to find Bickel proposing such an effort, having criticized sharply the Court's expansive reading of Section 5 in *Katzenbach v. Morgan*. (P. 48-49)
3. Federal courts have in recent months overturned *de jure* segregation in Denver; Pontiac and Benton Harbor, Michigan; and District 151 of Cook County, Illinois. A Los Angeles Superior Court has ordered an end to segregation in that city.

→ *from page 12*

Finally, there may be remedies in Title I suits which go beyond declaratory and injunctive exhortations to do the job right and into questions of control and of educational quality. If plaintiffs can point to outrageous uses of Title I funds (fire engines, bedroom sets, football jerseys, air conditioners, carpets, and so forth; all examples taken from HEW audits and pending lawsuits), if a long series of violations of substantive provisions of the law can be shown, and if the target children have received no demonstrable benefit from the presence of Title I funds in the district, then litigants can, with some confidence, try to convince the court that the school administration is systemically incapable of raising the achievement levels of poor children. The logical remedy in such a situation is a court-appointed master, receiver, or community committee, to oversee the Title I program and to ensure compliance with the law. The court should also be asked to establish a constructive trust whereunder unlawfully expended funds may be recouped and then employed to fund lawful projects supervised by the court's receiver. The essence of these remedies is obvious. Title I lawsuits should be employed as a means of gaining as much power for the poor to control the quality of their children's education as can be wrung from the court.

There are also dangers in Title I litigation. Recent experience with the comparability requirements, as reported on page 22 of this bulletin, has shown that Congress may be willing to suspend portions of the law as quickly as efforts to enforce it materialize. A loss in court may shatter the will of the community, particularly if it is unsophisticated, to organize around educational issues. Further, community efforts spent on Title I suits obviously divert legal and organizing resources from other worthy projects. Beyond these considerations, however, the decision to file a Title I law suit should not represent a judgement that a court can be persuaded to scold the school administration. Nor should a decision *not* to file a suit represent a judgement that proper administration of the Title I program is not a prize worth winning. The decision must be made in terms of whether the litigation will enable parents and the community to gain some power over educational decisions. The prospect of such power must be the primary purpose of Title I litigation.

**FOOTNOTES**

1. See Michelson's article in this issue, page 7, and in *Inequality in Education*, No. Two, page 4; Taba and Elkins, *Teaching Strategies for the Culturally Disadvantaged* (Rand, McNally Co., 1966).
2. See, e.g. Rogers, *110 Livingston Street* (Random House, 1968).
3. In this view, *Brown v. Board of Education* may be considered an effort to so commingle the educational fortunes of black and white children as to make discrimination against blacks by the whites who control the schools impossible.

# NOTES AND COMMENTARY

*This section of* Inequality of Education *features reports on research, litigation, government action, and legislation concerning education and the law. Readers are invited to suggest or submit material for inclusion in this section.*

## RESOURCE ALLOCATION

### FLORIDA LIMIT ON LOCAL TAXATION RULED UNCONSTITUTIONAL WEALTH CLASSIFICATION

A Florida law limiting the right of school districts to tax themselves has been ruled an unconstitutional classification based on wealth by a three-judge federal panel in Tampa. [*Hargrave v. Kirk*, D.C.M.D. Fla., Civil Action No. 68-463-Civ-T, May 8, 1970] Although the court took great care to distinguish this case from others in the area of school resource allocation, it still represents a first victory for the proposition that state school financing systems may not foster the unequal distribution of the burdens and benefits of education. Further, it has direct relevance in the 18 or more states where similar limits have been placed on local taxing powers.

The law in question, the Millage Rollback Act [Chap. 68-18, §23, Florida Laws, now F.S.A. §236.251], prohibited districts from taxing at a rate greater than ten mills on the assessed valuation on pain of forfeiting funds under the state's Minimum Foundation Program (MFP). The law was passed in 1968 following the statewide teachers' strike. Earlier, the law had required districts to tax locally above a certain floor before they were permitted to have MFP funds, but no ceiling was placed on local taxes. Under the Florida Constitution, districts were permitted tax up to ten mills without authorization from the voters and above with specific authorization. Twenty-four of the state's county-wide districts were taxing above the ten-mill rate with the approval of their voters when the Millage Rollback Act was passed. Included in these districts were Miami, Tampa, and Jacksonville, the three largest metropolitan areas in the state, as well as a representative sample of the rest of the state. In the first year, the "rollback," or revenues the districts would have had if the law had not been passed, amounted to more than $54 million. No district chose to pass up the state MFP funds for the privilege of taxing themselves at a higher rate; the MFP funds constitute roughly two-thirds of each district's budget.

The court's unanimous opinion, written by Circuit Judge David W. Dyer, exhibits a certain irritation with the defenses raised by the Florida Department of Education. Defendants had argued that "the difference in dollars available does not necessarily produce a difference in the quality of education." The court found that this assertion suffered from "unreality." The court noted that the single rate permitted one county to add $752 per child to MFP funds while another with a much poorer tax base could raise only an additional $52 per child and remarked, "What apparently is arcane to the defendants is lucid to us–that the Act prevents the poor counties from providing *from their own taxes* the same support for public education which the wealthy counties are able to provide." [Emphasis in original.]

As to the question of whether these wealth distinctions in the act had any rational basis, the court asked, "What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties?" The court continued, "As postulated by the plaintiffs, 'The Legislature says to a county, "You may not raise your own taxes to improve your own school system, even though that is what the voters of your country want to do." ' We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act." Having so failed to find a rational basis, the court remarked, "We decline the invitation to explore the fundamental-right-to-an-education thesis, and thus we do not reach the more exacting 'compelling interest' approach."

#### *McInnis* is different

The court had little difficulty in distinguishing the case at hand from other resource allocation cases. [*McInnis v. Shapiro* 293 F. Supp. 327 (N.D. Ill.) aff'd per curiam sub nom *McInnis v. Ogilvie* 384 U.S. 382 (1969); *Burruss v. Wilkerson*, 301 F. Supp. 1237, aff'd per curiam 38 U.S.L.W. 3310] The complaint in these cases was that state laws permitted wide variations in expenditure per child, while in *Hargrave* the problem was that the state required such variations. Further, in *McInnis* the plaintiffs sought reallocation of state funds on the basis of educational needs, a standard the court found judicially unmanageable. In *Hargrave* the plaintiffs' argument, which the court accepted, was simply that the equal protection clause forbids a state from allocating authority to tax by reference to a formula based on wealth.

The court thus enjoined the state from withholding MFP funds from any district because of violation of the Millage Rollback Act. The state has filed notice of appeal with the Supreme Court of the United States.

The suit was supported by the National Education Association. Attorneys for the plaintiffs were Hershel Shanks, Allan I. Mendelsohn, and Robert M. Perce Jr. of Washington, D.C., and Richard Frank of Tampa.

In a sense, the *Hargrave* decision does no more than put the victorious Florida plaintiffs on an equal footing with the losers in *Burruss* and *McInnes*. They will now be permitted to tax themselves much more heavily than the wealthy counties in order to have the same amount available per child for education. The limited scope of the question, however, may have made a decision possible which the broader principles asserted in *Burruss*

and *McInnis* did not permit. At any rate, the court found the millage limit offensive because it classified on the basis of wealth and permitted wide variations in school expenditures because of that classification. Although the court in *Hargrave* studiously avoided appearing to say so, there are other classifications of which the same can be said, specifically, the variations in the local tax bases which permitted the disparities found so offensive in *Hargrave*. Indeed, a New Jersey case, *Robinson v. Cahill* [Sup. Ct. N.J., Law Division–Hudson County, Docket No. L-18704], is based on precisely this point. As the *Robinson* complaint states, the plaintiffs are children "who are attending free public schools and who are being deprived of equal educational opportunities because the quality of their education is dependent upon the wealth of the district in which, by happenstance, they attend public school, or in which they reside, and who have an unequal amount of the State's taxable resources pledged to their education vis a vis other students in the State."

### *HOBSON II* ASKS EQUAL PER PUPIL SPENDING; REMEDY SOUGHT BURDENS BOARD, NOT COURT

*Hobson et al. v. Hansen et al.* (D.D.C. No. 82-66; "Amended Motion for Further Relief and for Enforcement of Decree;" Peter Rousselot, 815 Connecticut Avenue, Counsel.)

Judge Skelley Wright's 1967 decision in *Hobson v. Hansen* [269 F. Supp. 401 (D.D.C. 1967); *aff'd sub nom, Smuck v. Hobson,* 408 F. 2d 175 (D.C. Cir. 1969)], addressed to the Washington, D.C., schools, remains a landmark opinion with respect to the classification and the *de facto* segregation of students, and the allocation of resources among schools within the District. The primary emphasis–both of the case presented by the plaintiffs and of the decision reached by the court–was on establishing and securing rights. Of necessity, discussion of remedies was more generally framed.

The *Hobson* suit was never dismissed, but rather was remanded to the District Court. The current motion, which will also be heard by Judge Wright, raises anew the problem of remedy, specifically related to the allocation of resources.

In *Hobson I*, the court concluded that "the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality, at least unless any inequalities are adequately justified." (269 F. Supp. at 496). The court based this aspect of its opinion on fiscal 1964 data which showed a range from $216 to $627 in per pupil expenditures–a spread of $411. In the intervening years, the gap has increased, not narrowed; in fiscal 1968–the most current data made available to plaintiffs–the range was from $292 to $798–a spread of $506. It is this continuing violation of the *Hobson* decree that plaintiffs seek to rectify. The complaint proposes that per pupil expenditures from the regular Congressional appropriation (excluding specifically earmarked funds such as Title I ESEA and impact aid) be equally distributed among all children attending school in the District. It permits a 5% deviation, for administrative convenience; it also permits greater expenditures for compensatory and special education programs.

In order to secure implementation of the decree, plaintiffs propose that the school officials present to the court, and make generally available, data concerning per pupil expenditure. Plaintiffs' motion spells out in detail the nature of the data and the manner of presentation.

What the suit does *not* seek is as noteworthy as what it seeks. The motion does not discuss *racial* disparities; 95% of District students are black. Nor does it mention teacher distribution. Teachers' salaries account for 80% or more of the current expenditures of urban school systems and the greatest single source of existing dollar disparities is the salary differential for experienced teachers. This omission, however, is consistent with the theory of the suit; other specific expenditures are also omitted. The suit obliges the school board, and not the court, to determine how the constitutional standard of equal resource allocation shall be met. The primary importance of the case is not in breaking new legal ground–that was the burden carried by *Hobson I*–but on a remedy which would *in fact* secure the equal distribution of resources, a fact of considerable significance not only to Washington, but also to almost every school district in the country, where disparities comparable to those noted in *Hobson* persist unchallenged.

*Miscellaneous*

### IDAHO SUPREME COURT RULES: NO CHARGE FOR "FREE" SCHOOLS

*Paulson v. Minidoka County School District*, Idaho Supreme Court, No. 10418, January 16, 1970.

The Idaho Supreme Court has affirmed a holding that the state constitution's guarantee of a "system of public, free common schools" [Art. 9, Sec. 1] prohibits any required fees. The defendant district required payment of a $25 yearly fee. Half of this sum went for extra-curricular activities, such as the school yearbook; the other half was for text books. The district required payment in full and would not accept the partial payment offered by the plaintiffs. Failure to pay did not significantly affect their right to attend classes, or to graduate, but the school system did refuse to furnish a transcript of courses and grades because the fees had not been paid. The court ruled that activities fees charged to all constituted a charge for attendance and could not be permitted, although fees could be charged to those who chose to participate in a particular activity. As for the textbook fees, the court ruled that

> "Textbooks are necessary elements of any school's activity . . . . Unlike pencils and paper, the student has no choice in the quality or quantity of textbooks he will use if he is to earn his education. He will use exactly the books, prescribed by the school

> authorities, that his classmates use; and no voluntary act of his can obviate the need for books nor lessen their expense. School books are, thus, indistinguishable from other fixed educational expense items such as school building maintenance or teachers' salaries. The appellants may not charge students for such items because the common schools are to be 'free' as our constitution requires."

The district argued that the withholding of the transcript was proper because it was not part of the educational experience. The court disagreed and stated, "The school and the entire product to be received from it by the student must be 'free.'" And further, "The legal duty to make available a transcript arises from the practicality that, in our society, the ability to obtain a transcript without cost is a necessary incident of a high school education." The court permitted schools to require a deposit to cover extraordinary damage to books and also that a duplicating fee could be charged after the first free transcript.

# STUDENT RIGHTS

### *SCOVILLE* EXTENDS *TINKER* IN 7TH CIRCUIT STUDENTS MAY CRITICIZE SCHOOL POLICIES

*Scoville v. Board of Education of Joliet Township High School District 204*, 286 F. Supp. 988 (N.D. Ill., 1968) aff'd 415 F. 2d 860 (7th Cir., 1969), rev'd en banc on rehearing, April 1, 1970.

The Seventh Circuit Court of Appeals has upheld the right of high school students to distribute within school "material critical of school policies and authorities." The District Court decision, which held that school authorities were justified in expelling the students, was originally affirmed by the Appeals Court. On rehearing, however, that court reversed its stand and applied the constitutional test announced by the Supreme Court in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), decided after the initial District Court ruling in *Scoville*. The court said that "plaintiffs' freedom of expression was infringed by the Board's action, and defendants had the burden of showing that the action was taken upon a reasonable forecast of a substantial disruption of school activity."

The opinion emphasized the necessity of balancing the plaintiffs' interest in freely expressing controversial views against the interest of the state in furthering public education. The court noted that the fact "that plaintiffs may have intended their criticism to substantially disrupt or materially interfere with the enforcement of school policies is of no significance per se under the *Tinker* test."

The decision also said that the Illinois statute under which the school authorities acted was applied in an unconstitutional manner. The statute, which gives school boards the power "to expel pupils guilty of gross disobedience or misconduct," is typical of regulations in force in many other jurisdictions. The court left little doubt about the constitutional status of such provisions: they must be interpreted in light of the "material disruption and substantial interference" test of *Tinker*. Disobedience and misconduct cannot, standing alone, justify disciplinary action without a factual showing that disruption could have been reasonably forecasted or did in fact occur.

Although the plaintiffs in *Scoville* had already been re-admitted to school, relief was requested in the form of a declaratory judgment on the constitutionality of the rule in question, as well as an injunction ordering the school board to refrain from noting the incident on their official records. At this writing, it is unknown whether the case will be appealed to the Supreme Court.

Plaintiffs were represented by Paul M. Lurie of Chicago.

*Personal Rights*

### SUPREME COURT WON'T HEAR LONG-HAIR APPEAL; FIRST CIRCUIT FINDS NO STATE INTEREST IN HAIR

*Kahl v. Breen*, 296 F. Supp 702 (W.D. Wis.), aff'd, 419 F. 2d 1035 (7th Cir. 1969), appeal dismissed, 38 U.S.L.W. 3474 (June 1, 1970).

The Supreme Court has refused to hear this school board's appeal seeking Constitutional sanction for telling a student his hair was too long. Both the District Court and the Court of Appeals had already ruled that regulations governing hair length were violations of the due process clause.

*Richard v. Thurston*, Civil No. 7455, (1st Cir., April 28, 1970)

The First Circuit Court of Appeals has upheld a lower court ruling affirming the right of a male high school student to wear his hair long. Plaintiff had been suspended by his principal acting on his own authority. There were no formal rules in the school or the district pertaining to hair length.

The Appeals Court decision passed over plaintiff's attack on the lack of specific regulations, stating that parents and students alike were aware of the fact that long hair was not permitted, and proceeded directly to the constitutional issue. Noting that there existed "a thicket of recent cases concerning a student's wearing of long hair in a public high school," and that among the "pro-hair" decisions a number of constitutional approaches had been developed, Judge Coffin, speaking for the court, explicitly rejected any attempt to base the decision on either the First Amendment or on the "right of privacy" inferred from the Constitution in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965). Instead, he held that the due process clause of the Fourteenth Amendment "establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests."

The court was unable to find any state interest which justified the prohibition in question. "We see no

inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior. We do not believe that mere unattractiveness in the eyes of some parents, teachers, or students, short of uncleanliness, can justify the proscription. Nor . . . does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process."

Daniel D. Levenson, Spencer Neth, and Henry P. Monaghan of Boston represented the plaintiff.

*Discipline*

### PHYSICAL PUNISHMENT OUTLAWED IN BOSTON; CONSENT DECREE SIGNED BY SCHOOL COMMITTEE

*Murphy et al v. Kerrigan et al,* Civil Action 69-1174-W (D.C. Mass., June 3, 1970)

The Boston School Committee has been permanently enjoined from inflicting corporal punishment on any student under any circumstances under the terms of a consent decree. Plaintiffs had originally brought an action on behalf of all students attending a particular elementary school in Boston against both the School Committee and certain named teachers in the school. The original complaint had charged that "all teacher defendants inflicted corporal punishment maliciously, in bad faith, and with full knowledge that their conduct violated school department regulations" and that "all corporal punishment inflicted was excessive and not aproportionate response to any conduct of the plaintiff students." At the time the action was commenced, the School Committee regulations had authorized corporal punishment "for disciplinary reasons in extreme cases."

Plaintiff had argued, among other things, that corporal punishment in the Boston public school system violated due process, was administrered under unconstitutionally vague and overbroad standards, and violated the Eighth Amendment prohibition against cruel and unusual punishment.

Plaintiffs were represented by James W. Dolan, Lois Schiffer, Gershon Ratner, and Michael L. Altman of the Boston Legal Assistance Project.

*Entitlement*

### MARRIED STUDENTS CAN'T BE KEPT FROM JOINING IN EXTRA-CURRICULAR ACTIVITIES

*Johnson v. Board of Education of the Borough of Paulsboro*, Civil Action No. 172-70 (D.C.N.J., April 14, 1970)

This case challenged a school board rule which barred any married student or parent from participating in extra-curricular activities in high school. The plaintiff was a married student who had been denied the opportunity to take part in the high school athletic program or to go on a class field trip to Washington, D.C. The school board had set up as a justification for the policy the proposition that "when a student marries he assumes the responsibilities of an adult and thereby loses the rights and privileges of a school youngster."

Plaintiff's motion for summary judgment was granted. The District Court stated that the school board policy "is in derogation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and is, therefore, unconstitutional, illegal and void." It also permanently enjoined the defendant board "from discriminating against students as to participation in extra-curricular activities solely on the basis of said students' marital and/or parental status."

Carl S. Bisgaier and David H. Dugan of Camden Regional Legal Services, Inc. acted as attorneys for the plaintiff.

*Free Speech*

### WELFARE, SAFETY, AND MORALS OF STUDENTS UNIMPAIRED BY FLAG-RIPPING, COURT RULES

*Canfield v. El Paso County School District 8*, Civil No. J-842 (Dist. Ct., El Paso County, April 16, 1970)

The plaintiff in this Colorado case was a high school student who had been expelled from school for tearing an American flag during the course of an assigned speech in speech class. The school board had acted under a state statute which authorized expulsions for "behavior which is inimicable to the welfare, safety, or morals of other pupils." There were no rules or regulations at the local level setting standards for suspensions or expulsions.

In an unreported opinion, the court held that there were no legal grounds for the expulsion. "The Board produced no evidence whatsoever," the opinion stated, "that the welfare, safety or morals of any pupil was harmed by what [the plaintiff] said or did, or even that the class was distracted or the school disrupted by what he did."

The decision left little doubt that the plaintiff's behavior did not come under the terms of the statute and, in so doing, intimated that the only justifiable interpretation of the provision was one which met the constitutional test set out in *Tinker* and other cases. As the judge said: "It may well be . . . that some of the students were stunned or shocked or offended by what they heard, but in my mind behavior which only shocks, stuns or offends falls far short of behavior [which impairs] one's welfare, safety or morals." He went on to express the hope that in the future the school board "attempt better to distinguish between behavior . . . inimicable to the welfare, safety or morals of pupils on the one hand, and the free expression of unpopular ideas on the other."

Since the court ruled solely on the legality of the substantive grounds for the dismissal, it did not reach the question of the school board's failure to give the plaintiff a fair hearing.

Plaintiff was represented by Gary S. Goodpaster of Colorado Legal Services.

## RIGHT TO FULL, FAIR HEARING UPHELD IN THREE DISPARATE SUSPENSION CASES

*Jones et al v. Gillespie et al,* Civil No. 4198 (Ct.of Common Pleas, Phila., Order of April 22, 1970)

In an action brought on behalf of all students in the School District of Philadelphia, the plaintiff in this case successfully challenged the summary suspension procedures used within that district. The defendants in the action were the principal of the junior high school from which the named plaintiff had been suspended and all other principals in the school district. Plaintiff had been suspended from school for several weeks without having had a hearing or any indication of when he would be re-admitted to classes. The complaint alleged that the "widespread invidious practice among class defendants to suspend class plaintiffs longer than temporarily without affording class plaintiffs any form of hearing" violated state education laws as well as the Fourteenth Amendment to the Constitution.

Under the terms of a consent decree, the court enjoined the defendant principals from suspending any student in the district for a period longer than five days unless the student was granted a hearing. It also ordered the school board to establish written regulations setting "the formation of the hearing committee, notice to the student, right to counsel, evidence to be considered, form of hearing and appeals therefrom, and consequences of failure to hold a hearing within five days."

Daniel E. Farmer, Martha K. Treese, and Charles H. Baron of Community Legal Services, Inc., of Philadelphia acted as counsel for plaintiffs.

*Diggs et al v. Board of Education of the City of Camden,* Decision by the Commissioner of Education, May 18, 1970.

The plaintiff was suspended from school after having been arrested by local police and charged with being connected with students who had set a fire in the school. She brought action before the New Jersey Commissioner of Education against her principal, the city superintendent of schools, and the city school board representing "the class of students at Camden High School who have been or may be subject to suspension from class by order of their teachers and/or respondents herein." She had not been proven guilty nor afforded a hearing prior to her suspension. At the time of the hearing before the Commissioner, she had been out of school eight weeks.

The Commissioner ordered the School Board to either reinstate the plaintiff or offer her an equivalent form of instruction elsewhere. "Absent a plenary hearing which shows that petitioner is a clear danger to herself or to the orderly operation of the school," the ruling stated, "she cannot be denied her entitlement to free public school education." Noting that the state education laws contained no provisions for hearings in suspension cases, the Commissioner followed the interpretation of those statutes which had been set out in an earlier New Jersey state court opinion. That decision had held that New Jersey law "must be construed to require public school officials to afford students facing disciplinary action involving the possible imposition of serious sanctions, such as suspension or expulsion, the procedural due process guaranteed by the Fourteenth Amendment." *R.R. v. Board of Education of the Shore Regional High School*, 109 N.J. Super. 337. The Commissioner also pointed out that the distinction between suspensions and expulsions becomes meaningless when a student has been denied access to school for as long as the plaintiff had been in the instant case.

Carl S. Bisgaier of Camden Regional Legal Services, Inc., was counsel for plaintiff.

*Yee v. San Francisco Unified School District,* Civil No. 51431 (N.D. Calif., filed Nov. 5, 1969)

This action was brought on behalf of a Chinese-speaking high school student who had been suspended and then transferred from school for disciplinary reasons without ever being afforded a hearing. The suit challenged both the summary suspension and transfer as well as the fact that the School Board had noted the action on the plaintiff's permanent record. It was alleged that the relevant provisions of the California State Education Code and the disciplinary rules of the San Francisco Unified School District were unconstitutional as written in that they contained no provisions for a fair hearing prior to the taking of such disciplinary action as suspension, expulsion, or transfer. As in many jurisdictions, the local practice was to invite students and their parents to attend "conferences" with their school principal to discuss the disciplinary action already taken. The fact that the plaintiff in the instant case did not speak English made the need for a full hearing all the more acute.

The case was settled when the School Board agreed to expunge any notation of the action from the plaintiff's record. Although the judge made no formal ruling on the constitutional questions raised, he did state orally that due process had been denied the plaintiff and that the existence of the record itself, even though the student was presently in school, constituted a constitutional deprivation of rights.

The case was brought by Charles J. Wong, Arthur T. Berggren, Yin S. Wong, and Edward H. Steinman of the San Francisco Neighborhood Legal Assistance Foundation. That office is also working with the San Francisco School Board in drawing up a comprehensive disciplinary code for the entire system which, by safeguarding the procedural rights of students in suspension and transfer actions, would obviate the need for more *Yee*-type lawsuits.

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# Whatever Happened to Comparability?

## TITLE I

Title I comparability, potentially a powerful weapon for bringing about an end to within-district disparities in the allocation of resources for education, has been affirmed and then delayed by Congress.

On February 26, the U.S. Office of Education announced in Guideline No. 57 that it would vigorously enforce what it had not enforced at all before, the administrative requirement that Title I target schools must be provided with educational services from local and state funds which are comparable to those provided in non-target schools before Title I money is provided. [*Inequality in Education*, Numbers Three and Four, page 37]

Guideline No. 57 required, in effect, that locally funded equipment and services, and experienced (and high-salaried) teachers be equally distributed around the school system, in target and non-target schools alike, or that in cases where this was not possible that the differences be made up by the school system through provision of an equivalent value in other resources. Although the requirement of comparability had long been a paper provision in the administration of Title I, it had rarely been enforced, nor had it ever been stated so positively as it was in the new guideline.

Within weeks of the new guideline's promulgation, members of Congress who viewed it as a threat to established teacher placement policies in the large cities enacted an amendment to the Elementary and Secondary Education Act that affirmed the requirement of comparability, but also delayed its application for two years. [The most important language of the new amendment, passed April 13, is printed below.]

The Congressional intent in enacting the comparability amendment is not difficult to ascertain. In Northern cities, where the overt discrimination of the Deep South is often lacking, the disparities between poor and black Title I target schools and middle-class non-target schools are most often disparities in average instructional costs. With the familiar combination of strong teachers' unions, transfer policies favoring the experienced and more highly paid teachers, and the desire of many teachers to avoid ghetto schools, instructional costs, if not the quality of the teaching, are higher at the non-target schools. This differential is compounded by the greater proportion of uncertified, lower paid, substitute teachers in target schools. It is not uncommon to find that instructional costs at ghetto schools are 15 to 20 per cent lower than at other schools in the district. This is a sizeable number of dollars as instructional costs make up approximately 80 per cent of an average school district's budget. Against this background, the reaction of Northern Congressmen to the new guideline was predictable.

Compliance with comparability would require that a school system either redistribute its experienced teachers more equitably or redistribute its instructional dollars so that ghetto schools would have the same instructional budgets per child as non-ghetto schools. The former course of action, in most areas, would precipitate a teacher strike and, in any event, would be unacceptable to the black community; the latter course would require a massive reallocation of local and state funds and a sigificant increase in teaching personnel in ghetto schools. Although Congress agreed with the necessity for alterations in these arrangements, it also felt that time would be needed to make them.

The question remains as to what is left of the legal requirement that school districts spend local and state funds in an equitable manner before they are eligible for Title I aid. There are a number of approaches that may be taken in litigation or negotiation. First, it can be argued that the effect of the new comparability amendment is to prevent the Office of Education from cutting off funds to districts that violate comparability requirements. That is, the amendment affirms comparability, but restrains the Office of Education from using the most drastic remedy. In this context, private parties, who have an implied right to sue under the statute, could seek injunctive relief to compel school district to equalize services.

One can also argue that, at the minimum, school districts are obligated to take positive steps over the next two years to establish comparability. The new amendment clearly assumes that comparability remains a condition precedent for the grant of Title I funds, and requires school districts to submit data on the comparability question prior to the expiration of the two-year grace period. Further, the Congressional history of the amendment indicates that many supporters of the measure conceived of it as a means of giving districts a more substantial period of time to make massive changes in the financing of their schools. Thus, if a district employs the grace period to take steps which undermine comparability—for example by reallocating large sums to non-target schools—such measures could be opposed on the ground that they make compliance with the law in 1972 impossible. [See *Lampton v. Bonin*, 299 F. Supp. 336 (E.D.La. 1969) (three judge court) (dissent).]

Third, the amendment states that the supplanting of state and local funds with federal Title I funds is impermissible despite the new limitations on comparability. This may provide a handle with which to attack some comparability violations. The prohibition on supplanting local and state funds traditionally has been interpreted as preventing school districts from switching locally funded programs to the Title I program, and from using Title I funds for services to target children which are being provided from local funds for ineligible children. For example, if a school district provides nurses, library aides, and a remedial reading program for students in non-target schools, it may not spend Title I monies for precisely the

same services in target schools. In other words, both the comparability and supplementation requirements are designed to assure that participants in the Title I program receive compensatory educational services. The former requirement relates to the underlying expenditure of local and state funds, while the latter relates to the permissible expenditure of the federal funds. The failure of a school district to equalize dollars and services is a sign that Title I funds are being spent on programs in target schools which are already made available from local funds in non-target schools, and which should be made available from the same financial source in target schools. To the extent to which this situation exists in any particular school district, the failure to create a comparability in services may be attacked under the supplement-supplant rubric.

Finally, comparability has an independent Constitutional basis. Briefly, the classification of schools into target and non-target categories often, particularly in large cities, will prove to be based on race, since predominantly black schools are typically the targets for Title I services. The line of cases from *Plessey v. Ferguson* to *Hobson v. Hansen* makes clear that where schools are racially segregated (whatever the source of the segregation) there is a Constitutional obligation to, at least, equalize educational services between black and white schools. Further, since in the very nature of the Title I law a wealth distinction is drawn between target and non-target schools, discrimination against the poorer schools would be unconstitutional absent some compelling state interest. [See, e.g. Coons, Clune, and Sugarman, *Private Wealth and Public Education* (Harvard University Press, 1970)] The wealth of race arguments, in conjunction with Guideline 57 and the affirmation of comparability in the new amendment, may prove persuasive to a court as official pronouncements defining the concept of equivalency of educational services, or comparability.

The significant portion of the text of the new amendment appears below:

> . . . Federal funds made available under this title will be so used (i) as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this title, and (ii) in no case, as to supplant such funds from non-Federal sources, and (C) State and local funds will be used in the district of such agency to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such districts which are not receiving funds under this title: *Proviaed*, That any finding of non-compliance with this clause shall not affect the payment of funds to any local educational agency until the fiscal year beginning July 1, 1972, and *Provided further*, That each local educational agency receiving funds under this title shall report on or before July 1, 1971, and on or before July 1 of each year thereafter with respect to its compliance with this clause; (b) The amendment made by subsection (a) shall be effective with respect to all applications submitted to State educational agencies after thirty days after the date of enactment of this Act. Nothing in this section shall be construed to authorize the supplanting of State and local funds with Federal funds prior to the effective date of the amendment made by this section.
>
> (Secs. 109 (a) (3), 109 (b) of section 105 (a) of Title I of the Elementary and Secondary Education Act of 1965, 20 USC 241.)

**Mark G. Yudof**

**Still Available**

## TITLE I LITIGATION PACKET

These materials, prepared by the NAACP Legal Defense and Education Fund, Inc., and the Harvard Center for Law and Education, are based on current litigation testing the administration of Title I of the Elementary and Secondary Education Act of 1965. Included in the packet are a model complaint and model interrogatories; memorandums on reading and interpreting Title I applications, on the legal status of the Program Guides, on integration and concentration, and on standing, jurisdiction, and remedies; and copies of the Federal Regulations and the most significant Program Guides.

Packets have already been sent to each OEO Legal Services Project and each affiliated Inc. Fund law office. Non-profit organizations may buy copies at $3.00 each; others may buy copies at $10.00 each. These fees go to defray printing costs.

Send requests to:

**The Harvard Center for Law and Education**
**24 Garden Street**
**Cambridge, Massachusetts 02138**

**Attn: Title I Packet**

# INTEGRATION

## SUPREME COURT TAKES CHARLOTTE APPEAL; "REASONABLENESS" TEST TO BE TESTED

*Swann v. Charlotte-Mecklenburg Board of Education*, No 14,517, No. 14,518, 4th Cir., May 26, 1970.

* * *

The Supreme Court agreed June 29 to review the *Charlotte-Mecklenburg* decision of the Fourth Circuit Court of Appeals, which is discussed below. The Court's unsigned order stated no time for the case to be heard. Plaintiffs, defendants, and the Justice Department agreed on the desirability of a ruling by the Supreme Court. In the meantime, the district court was directed to consider a desegregation plan drafted by the Department of Health, Education, and Welfare. Pending the further proceedings, the district court's order was reinstated.

* * *

The Fourth Circuit Court of Appeals has vacated and remanded to the district court a plan to integrate the schools of the Charlotte-Mecklenburg County School District in North Carolina. The appeals court approved the district court's proposals for desegregating all the junior high and high schools in the district, but demurred at proposals for desegregation of all the elementary schools in the district on the grounds that the cost of bussing so many children was too great. "The board, we believe," the court stated, "should not be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system."

The opinion introduces the standard of "reasonableness" to desegregation litigation. Six members of the court, sitting en banc, produced among t' em four opinions. The central findings of the majority opinion, written by Judge John D. Butzner Jr., follow:

> "We hold: first, that not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race. Special classes, functions, and programs on an integrated basis should be made available to pupils in the black schools. The board should freely allow majority to minority transfers and provide transportation by bus or common carrier so individual students can leave the black schools. And pupils who are assigned to black schools for a portion of their school careers should be assigned to integrated schools as they progress from one school to another.
>
> "We adopted the test of reasonableness–instead of one that calls for absolutes–because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides a test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering, or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettoes so large that integration of every school is an improbable, if not an unattainable, goal. Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise explary plan for the creation of a unitary school system."[Citations omitted.]

Appeal had been taken from a decision written by District Judge James B. McMillan. Judge McMillan had found that an earlier desegregation plan approved by the Fourth Circuit [*Swann v. Charlotte-Mecklenberg Board of Education,* 369 F. 2d 29 (1966)] had not eliminated the dual school system as defined in subsequent Supreme Court decisions. Judge McMillan had devised a new plan, drawing on the work of plaintiffs, defendants, and court-appointed experts. The plan, which resulted in the integration of all 106 schools in the district, involved considerable bussing. Despite the variety of opinions in the case, all the circuit court judges agreed that considerable bussing would prove necessary to achieve extensive integration, just as it had earlier proved necessary to achieve segregation. The court stated that proposals for bussing should be judged on the criteria of the ages of the children involved, the distance and time required, the effect on traffic, and "the cost in relation to the board's resources."[1]

The reasonableness test was opposed by Judge Simon E. Sobeloff and Hartison L. Winter, each of whom wrote a dissent joined in by the other. Sobeloff called reasonableness a "slippery test" and a "new loophole." He expressed concern with the notion of apportioning the delivery of a constitutional right on the basis of "reasonableness" and with the articulation of a standard which might permit further obstructive litigation:

> "This notion must be emphatically rejected. At bottom it is no more than an abstract, unexplicated judgement–a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make. . . . It is not for the Board or this court to say that the cost of compliance with *Brown* is 'unreasonable.'" Judge Sobeloff warned of the impact the decision might have on desegregation. "Handed a new litigable issue–the so-called reasonableness of a proposed plan–school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. . . . Even more perncious, the new-born rule furnishes a

powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome."

In his dissent, Judge Winter was most concerned about the assumption of good faith on the part of defendant school boards that the new test appeared to require:

> "First, this is an appropriate case in which to establish the test. On this record it cannot be said that the board acted reasonably or that there is any viable solution to the dismantling of the dual system other than the one fashioned by the district court. Neither the board nor HEW has suggested one. . . .I would find no occasion to discuss reasonableness when there is no choice of remedies. Second, the majority sets forth no standards by which to judge reasonableness or unreasonableness . . . . with the absence of standards, how are the school boards or courts to know what plans are reasonable? The conscientious board cannot determine when it is in compliance. The dilatory board receives an open invitation to further litigation and delay. Finally, I call attention to the fact that 'reasonableness' has more than faint resemblance to the good faith test of *Brown II*. The 13 years between *Brown II* and New Kent County amply demonstrate that this test did not work. Ultimately it was required to be rejected and to have substituted for it the absolute 'now' and 'at once.' The majority ignores this lesson of history. If a constitutional right exists, it should be enforced."[2]

It is clear that in instituting this test of reasonableness, the Fourth Circuit is attempting to go beyond the "original sin" concept in desegregation cases in which the pre-*Brown* existence of a dual school system is all and everything that has happened since *Brown* is nothing. For instance, in finding that the segregation in the Charlotte-Mecklenburg schools was *de jure*, the court merely mentioned the former existence of a dual system, but discussed in detail the former enforcement of restrictive covemants, urban renewal patterns, segregated zoning, and school board building policies. Since such facotrs have been used to support findings of *de jure* segregation outside the South, in Pontiac, Mich., Los Angeles, and elsewhere, it should come as no surprise to find the Fourth Circuit examining them as well. In its *Norfolk* opinion, however, which came down a month later, the Fourth Circuit made little use of this broader view, apparently because of the comparative disinterest of the Norfolk school board in establishing unitary schools. [See below.]

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**FOOTNOTES**

1. Much of the discussion of bussing depended on statistics on traffic patterns, costs of buses, facilities, and drivers, and travel distances with which the judges seemed decidedly uncomfortable.

2. The fourth opinion in the case, by Judge Albert V. Bryan, asserted that the majority opinion, as well as the two dissents quoted here, represented support of bussing for racial balance, an impermissible aim in terms of the 1964 Civil Rights Act. Judge Bryan quoted from a memorandum written by Chief Justice Warren E. Burner in *Northcross v. Board of Education of Memphis*, 38 U.S.L.W. 4219, 4220 (March 9, 1970) which suggested judicial inquiry on whether "any particular racial balance must be achieved in the schools; . . . [and] to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." Bryan, nonetheless, joined in the court's opinion "for the sake of creating a clear majority."

## NORFOLK DESEGRAGATION PLAN REJECTED; TOO MANY ALL-BLACK SCHOOLS REMAINED

*Brewer v. School Board of Norfolk*, No. 14,544, 4th Cir., June 22, 1970.

*U.S. v. School Board of Norfolk*, No. 14,545, 4th Cir., June 22, 1970.

The Fourth Circuit Court of Appeals has rejected a desegregation plan for Norfolk, Va., on the grounds that it maintained classification by race and did not represent an end to the dual system. The Supreme Court has denied a petition by the Norfolk school board asking it to review the Fourth Circuit's remand.

The appeals court's opinion made only passing reference to its reasonableness doctrine, but the contrast to the Charlotte-Mecklenberg situation is fairly distinct. [See above.] The integration plan submitted by the board and approved by the district court did not significantly reduce the number of black schools in the system, although the number of integrated schools was increased. The school board had drawn its attendance zones so that in almost every instance, no white child would attend a school that did not have a majority white attendance. This rule left 76 per cent of the black children in all-black elementary schools, and 40 per cent of the white children in all-white elementary schools. For junior high students, 57 per cent of the black children would have been in predominantly black schools; one junior high would have remained all white. The 20 integrated elementary schools and 6 integrated junior high schools all would have had white majorities.

The court found that the board's plan countenanced exclusion of black children from integrated schools on the basis of their race.

The appeals court directed the district court to devise a plan which would immediately desegregate the high schools rather than waiting until a new high school was built as the lower court had been willing to permit. The school board was also directed to "explore reasonable methods of desegregation, including rezoning, pairing, grouping, school consolidation, and transportation. The board was directed also to make provision for free transfer for black children from schools with a majority of black children to integrated schools, including arrangements for transportation. Where black residential areas are too large to permit complete integration, the board must make every effort to conduct special integrated classes and functions and also to assign such pupils to integrated schools for "a substantial portion of their school careers."

## DENVER COURT ORDERS INTEGRATION AND EXTRA EDUCATION FOR MINORITIES TO CORRECT HARM

*Keyes v. School District No. 1 of Denver*, D.C. Colo., Civil Action No. C-1499, May 21, 1970.

A federal district court has ordered the Denver school board to eliminate schools with predominantly Negro or Latin attendance from its system by the beginning of the 1972 school year. In its order, the court ruled that neither integration nor compensatory education alone constituted an adequate remedy for previous segregation; both must be employed, the court said. The court also found that low achievement and low morale in the minority schools were evidence of an unequal educational opportunity.

The court did not rule on whether segregation in Denver was *de jure* or *de facto*, but stated that ma[illegible]ce of *de facto* secregated facilities of unequal quali[illegible]s probably unconstitutional in itself and that where minority children attend the inferior schools, "this probability becomes almost conclusive . . . ."

To the court, the crucial factual issue was whether compensatory education would be sufficient to equalize the schools in the system without integration. Plaintiffs' witnesses on this point included James Coleman, who conducted the Equal Educational Opportunities Survey; Neil Sullivan, Massachusetts Education Commissioner and former superintendent of schools in Berkeley, Calif.; and Robert O'Reilly, assistant director of research and evaluation for the New York state department of education. Coleman testified that isolation of children from lower socioeconomic groups "inevitably" results in an inferior educational opportunity. Coleman stated that since educational stimulation was often missing in the homes of minority children, that stimulation must come from other children in the class. If all the children in the class come from the same background, Coleman said, the negative effect produced by family background is reinforced. Sullivan told the court, however, that it was racial segregation per se and not socioeconomic isolation that led to inferior minority schools. Sullivan said that Berkeley had attempted to improve segregated schools through compensatory educational programs, but that without accompanying desegregation the programs had little effect on student achievement. O'Reilly, who has studied compensatory education on a national scale, testified that he had reached the same conclusion.

### The Board's Witness

The main defense witness on this point was Robert Gilberts, the district superintendent. He agreed with Coleman that the children were being hampered by their family backgrounds, but also stated that there was no affirmative evidence that desegregation would aid in providing an equal educational opportunity for minority children. Three of the school principals involved, after testifying on innovations in curriculum they had started for the minority children in their schools, agreed that these programs could be carried out in an integrated setting and that desegregation would improve educational opportunities for minority children.

Plaintiffs had presented the court with four desegregation plans, each of which called for considerable bussing. The school board's proposals hinged largely on compensatory education. The court stated that "in a setting of grossly inferior minority schools" compensatory education and a free transfer policy do not constitute a constitutionally acceptable remedy. "We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program—the only program which furnished anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment."

The court ordered the school system to institute an interim program of compensatory education and free transfers immediately, to have desegregated to a substantial degree by September 1971, and to have desegregated completely by September 1972. The school district has filed notice of appeal and plaintiffs are preparing a cross-appeal.

The action started in June 1969 after the school board rescinded three resolutions designed to desegregate the schools in the city's black neighborhoods. Plaintiffs won a preliminary injunction reinstating the resolutions; the court at that time stated that to rescind them had been indicative of *de jure* segregation. The injunction was stayed by the Tenth Circuit Court of Appeals, but reinstated by Mr. Justice Brennan, who was Acting Circuit Judge. [303 F. Supp. 289 (D.C. Colo. 1969); 90 S. Ct. 12 (1969)]

The plaintiffs were represented by Craig S. Barnes and Gordon C. Greiner of Denver and Conrad K. Harper of the NAACP Legal Defense and Education Fund, Inc.

## CONNECTICUT SUIT ATTACKS DISTRICTING; PLAINTIFFS CHARGE DE JURE SEGREGATION

*Lumpkin v. Dempsey*, Civil Action No. 13716 (D.C. Conn.)

In an action brought on behalf of all minority school children and their parents in the Town of Hartford against the governor and state board of education, plaintiffs are challenging a Connecticut statute which compels each town in the state to maintain a school district. This town-line districting arrangement, the suit alleges, "erects unnatural legal barriers to the desegregation of the Hartford School District and its individual schools, more particularly, those schools which have a minority group enrollment in excess of 90%." Since over 62% of the total school district population of Hartford is comprised of minority group children, eliminating racial imbalance is a statistical impossibility given the present district boundaries. This would be the case even if all the minority children were distributed evenly among the individual schools in the district.

The suit maintains that the racial segregation which exists in Hartford schools is a direct result of state

districting statutes and that these statutes operate, therefore, to deny plaintiffs and their class equal educational opportunity in violation of the Fourteenth Amendment. It is further alleged that the statutes not only perpetuate existing segregation in Hartford, but contribute to it by fostering a population exodus of non-minority group members from the town. "Such population movement has the effect of creating a segregated municipality whose government, social institutions and population as well as school enrollment are becoming almost entirely composed of minority group members."

All of the surrounding towns have low concentrations of minority group students in their schools (ranging from 1.0% in Wethersfield to 18.3% in Bloomfield), and it appears that the only possible way to eliminate the racial segregation which now exists in Hartford is through some arrangement under which urban and suburban students would attend the same schools. The plaintiffs are saying, however, that the state statute in question stands in the way of any such scheme. Plaintiffs argue that the theoretical possibility of merger, which would create integrated school districts does not remove the constitutional objection. "Laws making the integration of schools and the provision of equal educational opportunities dependent upon majority vote or acts of discretion on the part of public officials are unconstitutional."

Oral arguments were recently held before a three-judge panel on defendents' motion to dismiss. No ruling on that motion has come down as of this writing. Plaintiffs are represented by Douglas M. Crockett, Raymond B. Marcin, and Douglas Eldridge of Neighborhood Legal Services, Inc. of Hartford.

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→ *from page 6*

Lawyers can also move against those differentiating principles, such as aptitude tests, which inform the allocation process and without which compulsory tracking assignments could not be legitimated. Suits challenging the fairness of tests are both time-consuming and complex. If recent attempts at attacking tests are any indication, there is little guarantee of successful judicial resolution of the complex legal issues they raise. But nothing else so chills the cockles of an administrator's heart as an attack on those tools which allow him to mete out different amounts of education to different children while at the same time absolving him of any personal responsibility for the decision. And nothing else so triggers the most deep-seated educational fears of black and poor families as a test (or, revealingly, a "battery of tests") which they certainly never made and about which they have been told next to nothing.

A successful legal attack on either the grouping system as administered or the grouping system as conceived will not yield and educationally appropriate remedy. But it will not create a vacuum. More room to maneuver means more room for critically needed reform.

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**FOOTNOTES**

1. There are many analyses of this problem. A good, short, general description is Christina Tree, "Grouping Pupils in New York City," *The Urban Review*, September 1968.

2. See L. Cremin, *The Transformation of the American School*, (Random House, 1964) pages 188-191.

3. The four characteristics are adopted from A.B. Sorenson, "Organizational Differentiation of Students and Educational Opportunity," Report No. 57, Center for the Study of Social Organization of Schools, The Johns Hopkins University, December 1969.

4. See Ray C. Rist, "Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education," forthcoming, *Harvard Educational Review*, Vol. 40, No. 3 (August 1970).

5. See A. Cicourel and J. Kitsuse, *The Educational Decision-Makers* (Bobbs-Merrill, 1965).

6. The term is John Coons's. Anyone interested in the application of the equal protection clause to education should consult his work. See Coons, Clune, and Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 *California Law Review* 305, 326 (1969).

7. The most exhaustive analyses include: M. Goldberg, A. Passow, and J. Jostman, *The Effects of Ability Grouping* (Teachers College, Columbia University, 1966) and W. Borg, *An Evaluation of Ability Grouping*, Cooperative Research Project No. 577 (Utah State University; U.S. Office of Education; 1964). See also National Education Association, Research Division, *Ability Grouping–Research Summary 1968* (1968).

8. See Sorenson.

9. R. Rosenthal and L. Jacobsen, *Pygmalion in the Classroom* (Holt, Rinehart, and Winston, 1968).

10. J. McPartland, "The Segregated Student in Desegregated Schools," Report No. 21, Center for the Study of the Social Organization of Schools, The Johns Hopkins University, 1968. This study has been questioned on methodological grounds.

11. See D. Kirp, "The Poor, The Schools, And Equal Protection," *Harvard Educational Review*, Vol. 38, No. 4 (Fall 1968) p. 635.

12. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C., 1967) aff'd sub nom *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir., 1969). See *Inequality in Education* Number One, p. 11, for a list of other cases on the constitutionality of grouping plans. In no other case have the plans themselves been ruled on *per se*; in all cases the court required at least that there be some showing of actual harm before it would consider intervention.

13. The problem of testing is complex. Not only are the tests biased, but the manner in which they are administered can also have profound effects on scores. These questions will be discussed in a subsequent issue of *Inequality in Education*.

14. As noted, Judge Wright considered the fact that the Washington grouping scheme disadvantaged the poor and black as classes in tandem with the fact that the disadvantage occurred in the educational sphere and reached an equal protection requirement for "rationality" which was much tougher than that traditionally used by courts to scrutinize legislative distinctions between citizens. Some critics claim the higher standard is unwarranted; others claim it makes no sense. For an example of the latter point of view, see F. Michelman, "The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment," 83 *Harvard Law Review* 7 (1969).

15. See S. Michelson's articles in *Inequality in Education* Number Two, p. 4, and in this issue, p. 7.

16. This system of collective bargaining for educational goods will be discussed in greater detail in a subsequent issue of this bulletin.